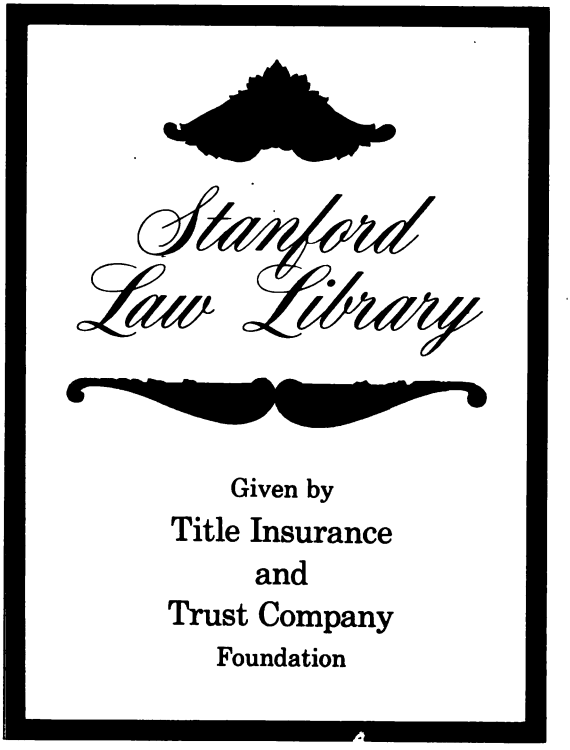

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THE

CARE OF ESTATES

PRACTICAL QUESTIONS AND PLAIN ANSWERS CONCERNING THE EVERY-DAY DUTIES, RIGHTS AND LIABILITIES OF EXECUTORS, ADMINISTRATORS, TRUSTEES AND GUARDIANS, WITH SOME SUGGESTIONS FOR LEGATEES AND TESTATORS

BY

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TO

MY ASSOCIATE OF MANY YEARS,

HOWARD O. WOOD.

FOREWORD.

MANY Executors, Administrators, Trustees and Guardians charged with the care of estates enter upon their duties with little or no knowledge of what will be required of them. Some are without any business training whatever. But no one who accepts such a responsibility, whether experienced or inexperienced, can be too well informed as to his or her rights, risks, safeguards and liabilities.

To obtain information it is necessary not only to ask questions, but also to know what questions to ask. Sometimes the inquiry which " sounds too simple " is the very one which ought to be propounded.

This catechism (largely suggested by the repeated inquiries of clients) does not pretend to add anything to the sum total of legal knowledge, or to exhaust the subjects touched upon. It does not aim to raise nice legal points, but merely to rehearse, in a simple manner, well-settled ones.

Neither does it attempt to make laymen their own lawyers. The layman who essays to manage an estate without legal advice will sooner or later surely come to grief. The main purpose of these questions and answers is to direct the inquiries of Executors and like officials into proper channels, and to afford a working knowledge of the everyday duties and dangers of their Trust.

If the Bar shall find in these pages practical suggestions and a convenient reference to familiar law, no small part of the writer's purpose will be accomplished.

The law applied is that of New York, but as its statutes and decisions are, in general, quite as strict as those of other States in the matters treated, the answers, if applied outside its jurisdiction, will probably err, if at all, on the side of safety.

The acknowledgments of the writer are due to Mr. Allen W. Johnson, of the New York Bar, for his able assistance in the verification of authorities and proof-reading, and to all the text-book authorities whose exhaustive compilations have simplified the making of this little volume.

FREDERICK TREVOR HILL.

82 William Street, New York,
October, 1901.

CONTENTS.

[*The numbers refer to Questions.*]

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ABBREVIATIONS.

Abb. N. C.,	Abbott's New Cases.
Abb. Pr. R., N. S.,	Abbott's Practice Reports, New Series.
App. Div.,	New York Appellate Division Reports.
Barb.,	Barbour's New York Reports.
Birds. R. S.,	Birdseye Revised Statutes, New York. (2d or 3rd eds.)
Bradf.,	Bradford's Surrogate's Reports.
C.,	New York Code Civil Procedure.
Collyer,	Collyer's Law of Partnership.
Con.,	Connolly's Surrogate's Reports.
Cook,	Cook on Corporations (4th ed.).
Daly,	Daly's Common Pleas Reports.
Dem.,	Demarest's New York Surrogate's Reports.
How.,	Howard's N. Y. Reports.
Hun,	Hun's New York Supreme Court Reports.
Jessup,	Jessup's Surrogate's Practice.
Johns., ch.,	Johnson's New York Chancery Reports.
L.,	Laws of New York.
Lewin,	Lewin on Trusts.
Misc.,	New York Miscellaneous Reports.
N. Y.,	New York Court of Appeals Reports.
N. Y. S. R.,	New York State Reporter.
N. Y. Sup.,	New York Supplement.
N. Y. Super. Ct.,	New York Superior Court Reports.
Paige,	Paige's New York Chancery Reports.
Perry,	Perry on Trusts.
Red.,	Redfield's Surrogate's Practice.
Redf.,	Redfield's Surrogate's Reports.
R. S.,	New York Revised Statutes.
Wend.,	Wendell's N. Y. Reports.
Woerner,	Woerner on Administration.

CHAPTER I.

BEFORE PROBATE.

1—Q. *What is the term used to describe a person making a Will?*

A. Testator, if a man; Testatrix, if a woman.

2—Q. *To whom should a Will be delivered after the death of a Testator?*

A. If the Executor is known, it should be handed to him. If he is not known, it should be placed in charge of some responsible lawyer.

3—Q. *Is it necessary to employ a lawyer in such a case?*

A. No. There is in every county a proper public office (Surrogate's, probate or orphans' court) where such documents may be duly deposited.

4—Q. *Should a Will be read by the Executor or others interested before it is filed in one of these public offices?*

A. It is quite usual and proper for the Executor or family lawyer to read the Will privately to the family or persons interested before

filing. It should, however, be promptly filed.

5—Q. *What is meant by probating a Will?*

A. It means proving to the satisfaction of the proper court its genuineness and its execution in accordance with the formalities prescribed by statute, so that it may become effective and authority be given to the Executors.

6—Q. *Must a Will always be probated?*

A. Yes.

Cumberland *v.* Graves, 9 Barb. 595;
Brant *v.* Livermore, 10 Johns. 358.

7—Q. *What does it cost?*

A. Nothing, unless the services of a lawyer are retained. There are practically no fees in the Surrogate's office for admitting Wills to probate.

8—Q. *Is it necessary to retain a lawyer in order to probate a Will?*

A. It is not necessary, but it is much wiser. It is important that notice of the probate proceedings be given to the proper persons and in the proper manner. These details can be learned, but, as a rule, time, money and trouble will be saved by employing a competent lawyer.

9—Q. *Where should a Will be probated?*

A. In the county of which the Testator was a resident at the time of his death.

C. 2476.
Matter of Zerega, 58 Hun, 505.

10—Q. *What Wills are provable in New York?*

A. A Will of real or personal property executed as prescribed by the laws of this State; or, a Will of personal property executed without the State and within the United States or Dominion of Canada, or Kingdom of Great Britain and Ireland, as prescribed by the laws of the State or country where it was executed; a Will of personal property executed by a person not a resident of this State, according to the laws of the Testator's residence.

C. 2611.

11—Q. *May the Executor named in a Will perform any duties before the probate of the Will?*

A. No. He has no authority at all before the Will is probated, except to pay funeral charges, and to do such other things as are necessary for the preservation of the property. As a matter of practice, however, the Executor is seldom called upon to provide for funeral expenses before probate, as this is generally attended to by the family. It is most imprudent for any person

to undertake any other duties of Executorship before his formal appointment.

C. 2613; 3 Birdseye (2d ed.), 3516, § 36; Patterson *v.* Patterson, 59 N. Y., 574; Matter of Mitchell, 36 App. Div. 542 (161 N. Y. 654).

12—Q. *What amount may an Executor expend for funeral expenses?*

A. He is not limited to any specific sum. He must decide upon the necessities of the case. He will be upheld in any reasonable outlay suitable to the condition and estate of the Testator. Funeral expenses are preferred debts payable within sixty days after an Executor qualifies.

C. 2729, sub. 3; L. 1901, ch. 293.

13—Q. *May an Executor include the purchase of a cemetery lot and headstone in funeral expenses?*

A. Yes, provided neither be extravagant. The Executor should, however, inform himself as to the amount of Testator's property before incurring heavy expenses.

Allen *v.* Allen, 3 Dem. 524; Matter of Barnes, 7 App. Div. 13 (19); 154 N. Y. 737; Ferrin v. Myrick, 41 N. Y. 315.

14—Q. *Is mourning for the family a funeral charge?*

A. Not as a rule, although this item has sometimes been allowed.

Allen *v.* Allen, 3 Dem. 524.

15—Q. *If no Will can be found, who takes charge of the estate?*

A. In that case application should be made to the proper court for appointment of an Administrator. (See Administrators.)

16—Q. *Has an Administrator the same authority as an Executor in the matter of funeral expenses?*

A. Yes.

C. 2729.

17—Q. *What are the credentials of an Executor called?*

A. "Letters Testamentary."

18—Q. *What are the credentials of an Administrator called?*

A. "Letters of Administration."

19—Q. *When a Will is filed for probate in the Surrogate's Office, how long must it remain in that office?*

A. For one year after it has been proved and recorded. It must then be returned, upon demand (unless there has been a contest), to the person who delivered it to the Sur-

rogate's Office, or, if he be dead, or a lunatic, or has removed from the State, to certain other interested parties, in the discretion of the Surrogate.

C. 2635.

CHAPTER II.

EXECUTORS.

(a) Qualification, renunciation and resignation.

20—Q. *What is an Executor?*

A. He is the person named in a Will to carry out instructions contained in it.

Red. 253.

21—Q. *What is meant by "administering" an Estate?*

A. Managing it.

22—Q. *May a woman act as Executor?*

A. Yes.

23—Q. *What is she then called?*

A. An Executrix.

24—Q. *May corporations and partnerships and non-residents be appointed Executors?*

A. Yes, in certain cases. (See Wills, Q. 499-502.)

25—Q. *Can persons under twenty-one years of age act as Executors?*

A. No.

C. 2612.

26—Q. *If a person under twenty-one years is named as Executor, who acts in his place?*

A. An "Administrator with the Will Annexed" is appointed to act until the Executor becomes twenty-one. (See Q. 259-264.)

C. 2612, 2613, 2643.

27—Q. *What other persons may not act as Executors?*

A. No person may act as an Executor who is, at the time the Will is proved, incapable in law of making a contract; or one who is an alien and not an inhabitant of this (N. Y.) State; or who has been convicted of an infamous crime; or who on proof is found by the Surrogate to be incompetent by reason of drunkenness, dishonesty, improvidence or want of understanding. A Surrogate may also, in his discretion, refuse to grant authority to a person unable to read and write the English language.

C. 2612.

28—Q. *From what source does an Executor derive his authority?*

A. From the Will itself; but before he interferes with the estate he must have the sanction of the proper court.

Red. 110; Hartnell *v.* Wandell, 60 N. Y. 346.

29—Q. *When an Executor named in a Will is authorized by the Court to act as such and takes the oath of office, what is this called?*

A. The Executor is said to have "qualified."

30—Q. *Is a person named as an Executor in a Will obliged to act as such?*

A. No.

31—Q. *May a person named as Executor be compelled either to qualify or renounce?*

A. Yes. The Surrogate must, after the expiration of certain fixed periods, on proper application, order such person to qualify within a definite time. In default of so doing, he is deemed to have renounced.

C. 2642.

32—Q. *What should a person nominated as Executor do if he does not wish to act?*

A. If more than one Executor be named, he need not do anything. His failure to qualify acts as a disclaimer. It is always better, however, to file a formal renunciation.

Fleming *v.* Burnham, 100 N. Y. 1.

33—Q. *What is a renunciation?*

A. It is a formal written declination of the Executorship, and should be filed in the Surrogate's office.

C. 2639; Matter of Baldwin, 27 App. Div. 506 (158 N. Y. 713).

34—Q. *Can a renunciation once made be retracted?*

A. Yes, under certain circumstances the Surrogate will allow this.

C. 2639; Codding *v.* Newman, 3 T. & C. 364 (63 N. Y. 639); Matter of Baldwin, 27 App. Div. 506. (158 N. Y. 713.)

35—Q. *May an Executor resign?*

A. Yes. After he has filed his account, and his account has been approved, the Surrogate may allow him to resign for a proper cause.

C. 2689, 2690.

36—Q. *What are some of the causes for which an Executor may be allowed to resign?*

A. Ill-health, removal from the State, inability to work harmoniously with co-Executors, financial troubles, or some other cogent reason. The Court will not be inclined to accept resignations because of other duties or general disinclination for the work.

Red. 357; Matter of Baier, 4 Dem. 162.

37—Q. *When one Executor resigns, or for any other cause ceases to act, may the remaining Executors carry on the work?*

A. Yes.

C. 2692.

Shook *v.* Shook, 19 Barb. 653; House *v.* Raymond, 3 Hun, 44.

38—Q. *If all the Executors die or become otherwise incapable of discharging their duties, who takes charge of the estate?*

A. The Court will appoint a successor in such a case.

C. 2693.

39—Q. *When an Executor dies, who should settle his accounts as Executor?*

A. His Executor.

C. 2606, as amended by L. 1901, ch. 409.

40—Q. *Where more than one Executor is named, should they all act?*

A. This question cannot be definitely answered, as it depends upon circumstances. In general, it may be said that the fewer Executors the better, because the authority is less divided and the responsibility more certain. As Executors may act independently of one another, it is not possible for any one Executor to act as a check on any other. (See Q. 55, 57.)

41—Q. *Must an Executor give bonds?*

A. Not unless some one interested in the estate demands it, on the ground that the circumstances of the proposed Executor do not afford sufficient security for due administration of the estate, or that the Executor is not a resident of this (N. Y.)

State. Although, if he has an office within the State and the Will dispenses with a bond, he may still act without giving security.

C. 2638, 2645.

(b) Surety Bonds.

42—Q. *What is an Undertaking?*

A. It is another name for a Bond.

43—Q. *If an Executor, Administrator, Trustee or Guardian be obliged to give bonds, what will be the amount of the security required?*

A. Generally the Bond must be equal to the value of the property involved.

C. 812, 2645, 2664.

44—Q. *May it ever be less than this?*

A. Yes. The Surrogate, in his discretion, may allow securities for the payment of money belonging to an estate to be deposited with him, to be delivered to the County Treasurer or some Trust Company, and to be subject only to the orders of the Executor, Administrator, Trustee or Guardian, countersigned by the Surrogate, and reduce the Bond by the amount of the securities thus deposited.

C. 2595.

45—Q. *How many sureties are required on a Bond?*

A. Not less than two, except in the case of corporate suretyship.

C. 811, 812.

46—Q. *What are the qualifications for bondsmen?*

A. Each must be a resident of the State and a householder or a freeholder, and must swear that he or she is worth the penalty of the Bond, or twice the amount of the sum mentioned in the undertaking over and above all his or her just debts and liabilities, and exclusive of property exempt by law from levy and sale under execution. In certain cases, where the Bond or undertaking is $5000 or upwards, the Court may allow the sum in which a surety is required to justify to be made up by the qualification of two or more sureties, each in a similar sum.

C. 812, 813.

47—Q. *Must the sureties be approved by the Court?*

A. Yes. And the approval must be endorsed upon the Bond.

C. 812.

48—Q. *May corporations act as bondsmen?*

A. Yes. Certain companies are expressly authorized by law to act as bondsmen, and

one such company will take the place of two individual bondsmen.

C. 811.

49—Q. *Which is preferable, corporate or individual bondsmen?*

A. As a general rule, corporate bondsmen are preferable in every case where the estate is sufficient to justify the expense.

50—Q. *Why?*

A. Because it is sometimes very difficult to secure individuals willing and able to assume the necessary responsibility, and it is always unpleasant to have to ask such favors. Moreover, the financial responsibility of an established surety company is more certain than that of any individual. In general, the business is more quickly done and better attended to in all its details, and affords more ample security for all parties concerned.

51—Q. *Are the premiums on surety Bonds a heavy expense?*

A. Not as a rule. It is largely a matter of special agreement. The Court limit is one per cent. per annum of the amount of the Bond.

C. 3320.

52—Q. *Are Executors, Administrators, Trustees and Guardians allowed to charge the estate for the amount paid as premiums for their official Bonds?*

A. Yes, provided it does not exceed one per cent. per annum of the amount of the Bond. For neglect or other misconduct the Court may charge Executors or like officials individually with such expense by way of punishment.

C. 3320.

53—Q. *Where can corporate Bonds be procured?*

A. In all large cities there are qualified surety companies or their agencies.

(c) Initial responsibilities and duties.

54—Q. *If a person named as Executor cannot personally attend to the affairs of the estate, should he act as Executor?*

A. As a general rule, he should not.

55—Q. *What are his responsibilities if he does nominally act as Executor, but takes no active part in the management of the estate?*

A. He is responsible only for what he actually does. But in case of mismanagement, his

name is apt to be associated with the occurrence.

56—Q. *Why are inactive Executors harmful to an estate?*

A. They increase expenses by being entitled to commissions which they do not earn.

57—Q. *Are Executors responsible for each other's neglect, default or other act?*

A. They are not, unless in some way they participate in it. Each one stands on his own footing.

R. 484; Adair *v.* Brimmer, 74 N. Y. 539 (95 N. Y. 35); Earle *v.* Earle, 93 N. Y. 104; Wilmerding *v.* McKesson, 103 N. Y. 329.

58—Q. *Must Executors act jointly in selling property or taking other important steps?*

A. No. Except in sales of real estate (Q. 163), each Executor is clothed with full authority. Trustees must act jointly. Executors need not. (See Q. 360, Trustees.)

1 R. S. 727, § 44; 2 R. S. 109, § 55; 1 Birds. (2d ed.), 1232; Red. 419; Fleming *v.* Burnham, 100 N. Y. 1. L. 1896 c. 547, § 56; see also L. 1898, c. 311.

59—Q. *What is the first duty of an Executor?*

A. To make on inventory or schedule of all a decedent's property.

C. 2711, 2714.

60—Q. *What is the next step usually taken by Executors?*

A. To have the personal property of the deceased person appraised according to law. This is not absolutely necessary, and in many cases it is best to omit the appraisal altogether. The expenses connected with this proceeding are sometimes very great.

C. 2711.

61—Q. *What are some of the next most important things for an Executor to do?*

A. (*a*) He should ascertain the debts due the estate, collect them, and advertise for claims against it according to law (see Debts).

(*b*) When he is sure there are sufficient funds to pay all debts, he should pay them (see Debts).

(*c*) He should pay all specific legacies (see Legacies).

(*d*) He should see that the taxes on the estate and on the legacies are paid at the earliest possible date (see Taxes).

(*e*) He should pay general legacies (see Legacies).

(*f*) He should file his account in the proper office (see Accounting).

C. 2711-2748.

62—Q. *Should an Executor keep accounts?*

A. Always.

Matter of Van de Veer, 63 App. Div. 495.

63—Q. *Should he keep a special bank account for his estate funds?*

A. Always.

64—Q. *Why?*

A. If he intermingles estate funds with his own, he is personally liable for any loss, and is chargeable with interest.

U. S. T. Co. *v.* Bixby, 2 Dem. 494; Red. 498.

65—Q. *Where should he deposit his funds?*

A. If there is a strong Trust Company available he should deposit with that. If there is not a Trust Company convenient, any National Bank or strong State Bank will suffice. (See Administrators.)

66—Q. *Why is a Trust Company preferable?*

A. Because most Trust Companies allow some interest on daily balances.

67—Q. *If the Bank selected for deposit fails is an Executor responsible?*

A. No. Unless he has some information which, as a prudent business man, should have been sufficient to warn him. If he

acts in good faith and with reasonable prudence, he will not be liable.

Sheerin *v.* Public Administrator, 2 Redf. 421; McCabe *v.* Fowler, 84 N. Y. 314; Wilmerding *v.* McKesson 103 N. Y. 329.

68—Q. *How should an Executor sign checks or other papers?*

A. He should usually use a rubber stamp, and sign his name as Executor under the printed name of the estate, thus: Estate of John Smith, by John Brown, Executor.

69—Q. *Can Executors bind their estate by contracts entered into by them in their official capacity?*

A. No. An Executor has no power to bind the estate by contract, except in transactions having an origin before the death of Testator. In other words, they may complete contracts, but cannot initiate them. (See Trustees, Q. No. 240.)

Parker *v.* Day, 155 N. Y. 383; O'Brien *v.* Jackson, 167 N. Y. 31.

70—Q. *Is an Executor personally liable for such new contracts, even if he gains no benefit from them and signs as Executor?*

A. He is.

71—Q. *May an Executor employ a bookkeeper at the expense of the estate?*

A. Theoretically, he is supposed to keep whatever books or accounts are necessary himself. But practically, a reasonable expenditure for bookkeeping will be allowed, due regard being had for the nature and amount of the property involved. He is allowed certain sums for the preparation of his formal account.

C. 2562; Bohde *v.* Bruner, 2 Redf. 333; Cornwall *v.* Deck, 2 Redf. 87.

72—Q. *May he employ an agent?*

A. Yes, when it is beneficial for the estate.

Purdy *v.* Lynch, 145 N. Y. 462.

73—Q. *Is he personally responsible for the acts of an agent?*

A. Yes.

Earle *v.* Earle, 93 N. Y. 104.

74—Q. *How can an Executor guard against such liability?*

A. In important matters it is usual for the Executor to require his agent to give bonds.

75—Q. *Is he personally responsible for the incompetency of an attorney?*

A. Theoretically, yes, for gross incompetence. But in general it may be said that if the Executor did not know, or have good rea-

son to know, that the attorney was incompetent, he will not be held responsible.

Hollister *v.* Burritt, 14 Hun 291; Wakeman *v.* Hazleton, 3 Barb. Ch. 148.

76—Q. *Is an Executor personally liable for an attorney's fees?*

A. Yes. The estate is not bound by the Executor's contract in this regard, but the courts will always allow a reasonable charge for counsel fee, and the Executor must exercise intelligent discretion.

Matter of Bradley, 1 Con., 106; Platt *v.* Platt, 105 N. Y. 488; Parker *v.* Day, 155 N. Y. 383.

77—Q. *What expenses may an Executor incur on behalf of the estate?*

A. Generally speaking, any expense incurred in good faith for the benefit of the estate and dictated by an intelligent discretion. It is impossible to attempt any specific instructions in this regard. But no heavy expenditure should be incurred without the advice of counsel.

R. 445-449.
Fowler *v.* Lockwood, 3 Redf. 465.

78—Q. *Where should an Executor deposit securities and papers of value belonging to his estate?*

A. If practical, he should deposit them in a box in some responsible Safe Deposit Com-

pany. It is not wise to keep such papers in his individual custody if this can be avoided.

79—Q. *Should each Executor have admittance to such safe-deposit box?*

A. They are all entitled to admittance, under proper arrangement among themselves. If they disagree, the matter can be referred to the Surrogate. (Q. 236.)

C. 2602.

(d) Assets.

80—Q. *Of what property is an Executor placed in charge?*

A. Of all personal property, except a few articles specially exempt from seizure by law.

C. 2514, 2712, 2713.

81—Q. *What does personal property include?*

A. Generally speaking, everything except real estate.

C. 2514, 2712.

82—Q. *Does the real estate pass into the Executor's charge?*

A. No. In the absence of express authority under the Will, the Executor has nothing

whatever to do with real estate. (See Real Estate and Trustee.)

83—Q. *In case the Executor is not given authority over the real estate, what becomes of it?*

A. It passes directly to the heirs or devisees; *i. e.,* persons to whom it is given by the Testator.

84—Q. *Is it always perfectly easy to distinguish what is personal and what is real property?*

A. As a general rule, it is perfectly plain. But sometimes it is difficult to decide rightly without legal advice. For instance, a house bought in by an Executor upon foreclosure of a mortgage is regarded in law as personal property. All such cases require special advice.

C. 2712; Lockman *v.* Reilly, 95 N. Y. 64.

85—Q. *Are debts due the Testator assets of which the Executor should take charge?*

A. Yes.

C. 2712.

86—Q. *Is the Executor empowered to sue for debts due the Estate?*

A. He is, and it is his duty to do so if they cannot be otherwise collected.

87—Q. *If a lawsuit to collect a claim is unsuccessful, is the Executor personally responsible for costs?*

A. No. If he has undertaken the litigation in good faith, the costs are a proper charge against the estate.

C. 3246.

88—Q. *Are lawsuits brought by the Testator in his lifetime assets in the hands of an Executor?*

A. Yes, if the cause of action survives. Certain actions terminate with the death of the plaintiff, others do not. To determine whether or not any particular action survives, the advice of counsel will be required.

C. 755.

89—Q. *Must actions by Executors be commenced within any specified time after Testator's death?*

A. Yes, there are various limitations in this respect. In general, it may be said that actions by Executors should be commenced promptly, and, as they are entitled to a preference, they should be speedily decided.

90—Q. *Should property outside of the State, or in foreign countries belonging to the*

estate, be included in the assets by the Executor?

A. Yes. If no foreign Executor is in charge of them.

Matter of Butler, 38 N. Y. 397; Sherman *v.* Page, 85 N. Y. 123.

91—Q. *Are rents accrued at the time of Testator's death properly considered as assets in the hands of the Executor?*

A. Yes, even if they are rents payable in advance.

C. 2712; Marshall *v.* Mosely, 21 N. Y. 280; Miller *v.* Crawford, 26 Abb. N. C. 376.

92—Q. *What acts are necessary on the part of an Executor to enable him to take possession of any particular asset?*

A. All he has to do is to claim it, in whatever hands it is. As a rule, the production of a certificate of the issuance of his Letters Testamentary will be sufficient to secure delivery. Physical possession is not necessary to support the Executors's claims. But if this is unduly denied him he must enter suit.

93—Q. *When an Executor has come into possession of assets, what is his duty in regard to them?*

A. If they are not specifically bequeathed, his

duty is to sell them for the best price possible and to invest the proceeds according to law. (Q. 291.)

Matter of Wotton, 59 App. Div. 585. (167 N. Y. 629.)

(e) Sales.

94—Q. *What property may an Executor sell?*

A. Any personal property belonging to the estate except such as is specifically bequeathed. (See Legacies.)

95—Q. *Can he ever sell property specifically bequeathed?*

A. Yes, if there are no other personal assets available for payment of claims against the estate, but not otherwise.

C. 2717.

96—Q. *Can he sell real estate?*

A. Not unless he is especially authorized by the terms of the Will, or directed by special order of Court.

97—Q. *Should an Executor sell at public or private sale?*

A. He may sell at either.

C. 2717.

98—Q. *May an Executor ever sell on credit?*

A. Yes. Except in the City of New York, he

may sell on credit not exceeding one year, with approved security. But this should be done with great caution, and the security must be satisfactory to the Surrogate.

C. 2717; Matter of Woodbury, 13 Misc. 474.

99—Q. *Is an Executor responsible for loss on such sales?*

A. No. If they are made in good faith, and with ordinary prudence.

C. 2717.

100—Q. *Suppose there are articles of merely a personal interest and value to friends or relatives of the deceased, and these are not specifically bequeathed, must they be sold?*

A. In a solvent estate it is usual for the persons most nearly interested in an estate to divide such things among themselves, arranging with the Executor to have their interest charged with the fair value of these articles. If some such arrangement is not reached, the Executor, in the absence of other instructions in the Will itself, usually sells everything not specifically bequeathed.

C. 2744.

101—Q. *Should an Executor ever purchase property for his own account from his estate?*

A. Not as a rule. However, should circumstances make such a transaction beneficial to the estate, the Executor must take every precaution to protect himself before purchasing, and he should never make any concealment of the fact that he is the purchaser.

Corbin *v.* Baker, 167 N. Y. 128.

102—Q. *Should an Executor ever convey real estate for a nominal consideration?*

A. He should not. The actual consideration should be expressed. A deed of real estate showing a nominal consideration paid to the Executor is, in the absence of explanation, defective. (See Real Estate.)

Binzen *v.* Epstein, 58 App. Div. 304.

103—Q. *May an Executor sell uncollectible debts and claims?*

A. Yes, at public auction.

C. 2719.

104—Q. *Should an Executor keep securities in which he finds the estate invested, or sell and reinvest in securities allowed to Executors by law?*

A. In the absence of instructions in the Will, it is usually the best policy to sell and

reinvest. Special circumstances must, however, govern each case.

McRae *v.* McRae, 3 Bradf. 199; Matter of Wotton, 59 App. Div. 584.

105—Q. *When Executors sell corporate stock or registered bonds, what authority must they show?*

A. A certificate of the issuance of Letters Testamentary will usually be sufficient; but the certificate should be of recent date. (See Trustee for different rule Q. 235, 335, 336, 341.)

106—Q. *Why should the certification be of recent date?*

A. Because the Executor, though once appointed, might have died or been removed, and the purchaser is entitled to reasonable proof in this regard.

107—Q. *How should an Executor endorse certificates of stock?*

A. With the name of the holder, followed by his own name as Executor. Thus: John Smith, by John Brown, Executor.

108—Q. *Is an Executor justified in bidding in for the estate property which, in his judgment, is selling too low?*

A. Yes.

Valentine *v.* Belden, 20 Hun, 537; Lockman *v.* Reilly, 95 N. Y. 64 (71).

109—Q. *Where real estate is sold to pay debts, may the Executor become a purchaser?*

A. No. If he does, the sale is void. This is also true of Guardians and Administrators.

C. 2774.

110—Q. *Can a creditor compel an Executor to sell property?*

A. Yes. (See Debts.)

C. 2749-2802.

111—Q. *If an Executor is empowered to sell real estate, what sort of deed should he execute?*

A. He should never sign anything but an Executor's deed, forms for which can be obtained at any stationer's. But in real-estate transactions, which are more or less technical, counsel should always be consulted. (Q. 160.)

112—Q. *Does power to sell give an Executor the right to pledge or exchange?*

A. No.

First Nat. Bank *v.* Nat. Broadway Bank, 156 N. Y. 459; Merchants' Bank *v.* Livingston, 74 N. Y. 223, Perry § 769.

(f) Investments.

(Also see Trustees, Q. 287-350.)

113—Q. *Should an Executor make investments?*

A. Yes. If he has funds available he is liable for interest and should make appropriate investment, if only by way of putting funds in some depository which will pay interest.

114—Q. *In what should he invest?*

A. In the absence of special authority in the Will, he may invest only in United States or State bonds, and in loans on real estate, and in the obligations of a city of New York State issued pursuant to law.

L. 1897, ch. 417, § 9.
King *v.* Talbot, 40 N. Y. 76.

115—Q. *Within what time should an Executor begin to make investments?*

A. Within a reasonable time after he is appointed, which has been held in one case to be six months.

Halsted *v.* Hyman, 3 Bradf. 426.

116—Q. *Is an Executor ever permitted to invest in anything except the securities above mentioned?*

A. Not unless the Will expressly directs him

so to do. Even when the Will gives authority to the Executors to make investments in securities not expressly authorized by law, he should exercise this discretion with the greatest possible caution. The New York courts have made some very strict decisions on this point.

Matter of Keteltas, 1 Con. 468; Matter of Hall, 164 N. Y. 196; Matter of Cant, 5 Dem. 269; Matter of Wotton, 59 App. Div. 585; 167 N. Y. 629.

117—Q. *If an Executor invests in securities not authorized by law, or plainly permitted by the Will, is he personally liable for the loss?*

A. He is.

Matter of Hall, 164 N. Y. 196.

118—Q. *Is an Executor ever personally chargeable with interest?*

A. Not for the first year, if he has kept the funds separate and not intermingled them with his own, or employed them for his own benefit; after that period he is.

U. S. Trust Co. *v.* Bixby, 2 Dem. 494.

119—Q. *Is he obliged to earn any particular rate of interest on his funds?*

A. No. All the law requires him to do is to keep the funds at interest.

Shuttleworth *v.* Winter, 55 N. Y. 624; Collyer *v.* Collyer, 6 N. Y. S. R. 693.

120—Q. *If he neglects to invest, with what per cent. interest is he chargeable?*

A. The full legal rate.

Thorn *v.* Garner, 42 Hun, 507; 113 N. Y. 198.

121—Q. *May an Executor deposit funds in a bank in which he is a director, cashier or stockholder?*

A. Yes, but it will be entitled to draw interest at the rate prevailing at the bank.

Matter of Sudds, 66 N. Y. Sup. 231; 32 Misc. 182; Matter of Babcock, 29 N. Y. S. R. 947; 2 Con. 82.

122—Q. *May an Executor deposit his funds in a private bank of which he is the virtual owner?*

A. No.

Matter of Thorp, 31 Misc. 581, 65 N. Y. Sup. 575.

123—Q. *May an Executor invest in mortgages on improved real estate outside the State in which he is appointed?*

A. The New York courts have made decisions indicating disapproval of such investments.

Ormiston *v.* Olcott, 84 N. Y. 339; Denton *v.* Sanford, 103 N. Y. 607.

124—Q. *If an Executor invests in securities not permitted by law, what is his liability?*

A. He is responsible for any losses, and must, of course, account for any profits made.

Baker *v.* Disbrow, 18 Hun, 29; 79 N. Y. 631.

125—Q. *Is an Executor responsible for shrinkage in investments made according to law or within his authority?*

A. Not unless the loss resulted from some negligence on his part.

Valentine *v.* Valentine, 3 Dem. 597.
C. 2729.

126—Q. *May an Executor ever make a personal profit from investment of funds in his hands?*

A. No.

C. 2729; Fulton *v.* Whitney, 66 N. Y. 548.

127—Q. *What rule should in general govern the investment of Trust funds?*

A. The rule of safety. An Executor or Trustee is not expected " to make money " for his estate. He is charged with the duty, first, of preserving it, and second, of making it yield a fair return. Any Executor or Trustee who tries to do more than this incurs a responsibility out of all proportion to the appreciation he will receive.

(g) Debts.

128—Q. *How should an Executor ascertain debts?*

A. He should advertise for claims once a week for six months in newspapers designated by the Surrogate.

C. 2718.

129—Q. *Suppose the Testator has never been in business and the Executor is convinced that there are no debts, must he still advertise for claims?*

A. The law merely says he may advertise, but it is usually done.

C. 2718, 2728.

130—Q. *Within what time must a creditor begin an action on a rejected claim?*

A. Within six months after rejection, or if no part of it is then due, within six months after a part becomes due, unless a written consent is filed by both parties that the dispute may be passed upon by the Court on the settlement of the Executor's accounts. (See Accounting.)

C. 1822.

131—Q. *What proof must an Executor require that a debt is due from an estate?*

A. Informal proof is sufficient. It is usual to

require an affidavit, although an affidavit is not necessary. If there is any reason for doubting the validity of the claim, it should be rejected.

C. 2718.

132—Q. *Does an Executor incur any personal responsibility by refusing to pay a claim?*

A. Not if he rejects it in good faith. But he does incur responsibility if he pays an improper claim.

133—Q. *How should an Executor reject a claim?*

A. By any positive and unequivocal refusal to pay. The preferable method is a written communication.

134—Q. *How long has an Executor to decide whether or not he will pay a claim?*

A. No fixed time is set by law. He is required to pay debts with due diligence.

C. 2719.

135—Q. *Should he pay any debts until he knows the full indebtedness of the estate?*

A. Funeral expenses are preferred debts usually payable within 60 days after the Executor qualifies. Unless the Executor is sure that the assets of the estate will equal the liabilities he should not pay other claims until he has completed his inventory and his advertising for claims.

C. 2729.

136—Q. *Why?*

A. Because he may be held personally liable if there are not enough funds to pay all debts.

Glacius *v.* Fogel, 4 Redf. 516, 88 N. Y. 434.

137—Q. *If a claim is presented to an Executor about which he has no knowledge as to whether it is valid or invalid, what should he do?*

A. He should offer to refer it. The law provides that doubtful claims may be speedily passed upon by a referee or arbitrator approved by the Surrogate. The procedure is not expensive, and, as it fully protects both the creditor and the Executor, the Executor should avail himself of it in every case where there is any doubt.

C. 2718.

138—Q. *Who pays the expenses of such reference?*

A. If the Executor has not availed himself of the opportunity for referring the claims as provided by law, and the claimant is successful, costs may be awarded against the estate or the Executor individually, as the Court may direct. If the claimant is unsuccessful, the costs fall on him.

C. 1822, 1835, 1836, 2718.

139—Q. *When an Executor makes a payment, should it be by check or cash?*

A. Always by check, if possible, as the check itself is in the nature of a receipt.

140—Q. *What receipt should an Executor have for payments?*

A. He should always take a receipt in duplicate. One for his personal use, and one for filing with the Court.

141—Q. *In what order should an Executor pay debts?*

A. First: Debts entitled to a preference under the laws of the United States, which means mainly customs dues and bonds executed by Testator to the United States authorities.

Second: Taxes assessed on the property of the deceased previous to his death. (See Taxes.)

Third: Judgments docketed and decrees entered against decedent according to their priority.

Fourth: All bonds, sealed instruments, notes, bills and unliquidated accounts.

Preference shall not be given in the payment of a debt over other debts of the same class, except those specified in the third class. A debt due and payable shall not be entitled to a preference over debts not due. The commencement of a suit for the recovery

of a debt or the obtaining a judgment thereon against the Executor or Administrator shall not entitle such debt to preference over others of the same class. Debts not due may be paid according to the class to which they belong, after deducting a rebate of legal interest on the sum paid for the unexpired term of credit without interest. Preference may be given by the Surrogate to rents due or accruing on leases held by the testator or intestate at the time of his death over debts of the fourth class, if it appear to his satisfaction that such preference will benefit the estate of the testator or intestate.

C. 2719.

142—Q. *May an Executor pay a debt due to himself?*

A. He may not until it is especially passed upon by the Surrogate.

C. 2719; Matter of Marcellus, 165 N. Y. 70.

143—Q. *May an Executor compromise a debt?*

A. Not without the express authority of the Surrogate.

A. 2719.

144—Q. *Suppose a Testator specially directs the*

payment of a debt to which there is a legal defense, is the Executor protected by the instruction and authorized to pay the debt?

A. Yes.

Gilbert *v.* Morrison, 53 Hun, 442.

145—Q. *Is a bequest of a debt due from an Executor binding on creditors of the estate?*

A. No. If the debt be necessary to satisfy creditors, it must be regarded as an asset; it is a specific legacy and must be treated as such. (See Q. 389.)

C. 2714; Adair *v.* Brimmer, 74 N. Y. 539.

146—Q. *Must an Executor set up any legal defense of which he has knowledge, even if he thinks it is unjust?*

A. Yes. If he pays a claim to which there is even a technical defense in law, he may be held personally responsible, except as stated in Q. 144.

Matter of O'Rourke, 12 Misc. 248, 250; Butler *v.* Johnson, 111 N. Y. 204; Schutz *v.* Morette, 146 N. Y. 137.

147—Q. *Within what period is a debt of decedent absolutely barred?*

A. A simple contract debt is barred in six years after the expiration of 18 months from the Testator's death.

Butler *v.* Johnson, 111 N. Y. 204.

148—Q. *Suppose that a claim has been presented to and allowed by the Executor, but no action begun within that period, is it still barred?*

A. Yes.

Schutz *v.* Morette, 146 N. Y. 137.

149—Q. *Within what period must an action for damages to personal property be commenced against an Executor?*

A. Within three years.

C. 383.

150—Q. *If a creditor does not present his claim to the Executor after six months of public advertising, is his claim barred?*

A. No. But the Executor may then distribute funds in his hands without incurring any liability. (Q. 129.)

C. 2718.

151—Q. *Can an Executor be compelled to pay a debt without being sued for it?*

A. Yes. A creditor may present a petition to the Surrogate praying that his debt be discharged, if six months have expired since Letters Testamentary were issued to the Executor; but the objections which may be made to this petition are so broad that this method of enforcing payment is sel-

dom successful. It is usually resorted to by judgment creditors.

C. 2722; Matter of Corbett, 90 Hun, 182; Cuthbert *v.* Jacobson, 2 Dem. 134.

(h) Real Estate.

152. Q. *Has an Executor any authority in regard to real estate?*

A. Not unless the Will gives him special power.

R. 424.

153—Q. *May he rent real estate, or collect rents?*

A. Not unless the Will gives him power. Except for payment of debts by authority of Court.

C. 2750.

154—Q. *May an Executor not especially charged by the Will with care of real estate ever pay taxes on it or do repairs?*

A. Yes. Taxes which were a lien at death of Testator. Moreover, if the Executor pays taxes or makes repairs, and can prove that it was necessary for him to do so to preserve the real estate, or that his action benefited the general estate, the Court will protect him and allow the payment. (See also Taxes.)

Hancox *v.* Meeker, 95 N. Y. 528; Woerner, sec. 518.

155—Q. *May an Executor ever mortgage or sell real estate without being expressly permitted so to do by the Will?*

A. Yes. Under certain circumstances, when there is no personal property of the decedent applicable to the payment of debts, the Court may specially authorize the mortgaging, selling or leasing of property. The proceedings are, however, extremely technical, and cannot be undertaken without the advice of a competent lawyer.

C. 2749-2801; C. 2563-4; C. 2583; C. 2726.

156—Q. *What rents are collectible by the Executor in the absence of special powers under a Will?*

A. Only those rents which were due at the death of his Testator.

C. 2712, subd. 7.

157—Q. *If a Testator owns real estate on which there is a mortgage, and this mortgage is foreclosed, and on the sale there is a surplus, is this surplus to be regarded by the Executor as real estate or personal property?*

A. As real estate.

Dunning *v.* Ocean National Bank, 61 N. Y. 497.

158—Q. *When may an Executor sell real estate without special instruction from the Court?*

A. Only when he is given a full power of sale by the terms of the Will.

159—Q. *What is the usual form of words employed in conferring such full power of sale?*

A. "I authorize and empower my Executors to sell and dispose of any and all of my real estate and to execute and deliver good and sufficient deeds of conveyance therefor."

It is not necessary, of course, that this exact phraseology be used, but it is necessary that positive and unmistakable authority be conferred. The New York courts have made many decisions construing supposed "powers of sale," and an Executor should consult counsel before exercising any such power. (See Wills, Q. 491.)

160—Q. *In selling real estate, what precautions should an Executor take?*

A. (1) He should make certain that he has legal authority to sell.

(2) He should see that a proper contract of sale is executed.

(3) He should see that he does not ex-

ecute any deed other than an Executor's deed.

(4) He should always have the exact price set forth in the papers.

Unless an Executor has special training and experience in real-estate matters, it is unwise for him to act without the advice of a competent lawyer.

Binzen *v.* Epstein, 58 App. Div. 304; Ramsey *v.* Wandell, 32 Hun, 482.

161—Q. *How soon may an Executor, with full power of sale, sell real estate free of all claims?*

A. After three years after the date of the Executor's "Letters Testamentary" he can sell free from creditors' claims, but up to that time he cannot convey, except subject to such claims.

C. 2750; Platt *v.* Platt, 105 N. Y. 488.

162—Q. *Does this practically prevent sales of real estate for three years?*

A. No. because, if the property of the Testator can be shown to be ample for the discharge of all his debts, purchasers usually waive this objection. But the purchaser who refused to complete his purchase on this ground would be obliged to show debts and insufficient personal assets.

Moser *v.* Cochrane, 107 N. Y. 35.

163—Q. *May one of several Executors sell real estate and convey good title?*

A. Not if the other Executors have qualified. All qualified Executors who have not formally renounced must unite in the deed.

C. 2642; Fleming *v.* Burnham, 100 N. Y. 1; L. 1896, c. 547, § 56; see also, L. 1898, c. 311.

164—Q. *If power of sale be given to Executors, can they ever be deprived of it?*

A. Yes. Conveyance of the property by the heirs or parties in interest may defeat the Executors' power, especially after the Executors have allowed a long period of time to elapse without exercising their authority.

Greenland *v.* Waddell, 116 N. Y. 234; Roberts *v.* Cary, 84 Hun, 328.

165—Q. *May an Executor sell real estate outside of the State in which he was appointed under a power contained in the Will?*

A. Yes, but the laws governing real estate in each State must be complied with. In most states an exemplified copy of the Will and a certificate of his authority from the Court appointing him will enable an Executor to sell.

Newton *v.* Bronson, 13 N. Y. 587; Hawley *v.* James, 5 Paige, 318 (476).

166—Q. *If the Executor's power of sale is coupled with conditions as to time, place, purpose or otherwise, should the Executor comply strictly with the conditions?*

A. He must do so. His only authority is the Will. If he deviates from his instructions in any particular, he is without any authority whatsoever.

Bostwick *v.* Beach, 31 Hun, 343; 103 N. Y. 414 Ramsey *v.* Wandell, 32 Hun, 482; Gulick *v.* Griswold, 160 N. Y. 399.

167—Q. *How should an Executor sign a deed of real estate?*

A. With his own name, adding the words "As Executor."

168—Q. *Should an Executor pay interest on mortgages upon real estate?*

A. He should, as long as he has funds applicable for such purpose, if the real estate is in his charge.

Red. 495.

169—Q. *When real estate is entrusted to an Executor, should he insure it against fire?*

A. Yes, if it is improved property. He would be held liable for neglect if he did not do so and loss resulted.

Tickel *v.* Quin, 1 Dem. 425.

170—Q. *What other duties devolve upon Executors charged with care of real estate?*

A. Their duties are exactly those of Trustees. (See Trustees, Qs. 349-363.)

171—Q. *What is the duty of an Executor in regard to property leased to the Testator?*

A. He should collect rents accruing after the Testator's death and apply them, as far as they will go, to payment of rent specified in the lease to the Testator. He should not place these rents among the general assets.

Miller *v.* Knox, 48 N. Y. 232.

172—Q. *Are Executors personally liable to landlord for rents and profits collected from property leased to the Testator?*

A. They are.

Miller *v.* Knox, 48 N. Y. 232.

(i) Taxes.

173—Q. *For what taxes is an Executor responsible?*

A. He is responsible for the payment of the Transfer Tax (sometimes called the Inheritance or Succession Tax), which is a tax imposed on property (technically on

the transfer of property) passing by Will or intestacy.

L. 1896, c. 908, art. x.; L. 1897, c. 284; L. 1901, c. 173 and 493.

174—Q. *What liability does an Executor incur if he fails to pay these transfer taxes?*

A. He is personally liable for its payment, and his accounts cannot be passed unless he produces a receipt for same.

L. 1896, c. 908; L. 1901, c. 173.

175—Q. *Are all estates taxable under this law?*

A. Practically all, except those of less than $500. Personal property of less than $10,000 in value is, however, exempt when it passes directly to father, mother, husband, wife, child, brother, sister, wife or widow of a son, or the husband of a daughter, or adopted child or children. This law is technical, and is so often amended as to require special study in each case, and the advice of competent counsel.

L. 1896, c. 908; L. 1901, c. 173.

176—Q. *Within what time should an Executor pay these inheritance taxes?*

A. They should be settled at the earliest possible date for the good of the estate, as certain discounts for prompt payments are

given; if possible, they must be paid within eighteen months from the death of the testator. If they can be, but are not paid within that time, penalties attach. It is usual to pay part of the tax even before the whole tax can be ascertained, in order to save interest.

L. 1896, c. 908; L. 1901, c. 173.

177—Q. *Are there any other taxes which an Executor must discharge?*

A. In New York he must pay taxes on the personal estate in his hands.

L. 1896, c. 908, §§ 3, 8.

178—Q. *Is this a heavy tax?*

A. It is the heaviest tax to which any property is subjected, and if the Executor is assessed, he should take the advice of some competent lawyer, as there have been many decisions defining what is and what is not taxable.

179—Q. *How will an Executor know if he is assessed?*

A. In New York City notices are usually sent by the Tax Office. But this is not required by law, and the records should be examined if no notice is received. This can be done in New York City from January to April 1st. Outside New York

and other specified cities the records are open between August 1 and the third Tuesday in August. The Tax Assessors meet to hear complaints on this third Tuesday in August.

L. 1896, c. 908, §§ 32, 35, 36; Charter of City of New York (1901), §§ 892, 898.

180—Q. *When is this tax assessed in New York City?*

A. On the second Monday in January of every year.

181—Q. *If the assessment is too high, within what time can it be corrected?*

A. Up to and including March 31st.

182—Q. *What is the proper method of correcting the assessment for personal tax?*

A. The Executor should go before the Commissioners of Taxes and Assessments personally, accompanied by counsel, and apply for a reduction.

183—Q. *If this reduction is not granted by the Commissioners, what is the remedy?*

A. Their decision can be reviewed by the courts, if action be begun in time, and advice of counsel in this regard should be sought promptly. In New York City action must be begun before the 1st of No-

vember of the year in which the decision is made. Outside New York City it must be begun within 15 days after the filing of the assessment-roll and the first posting and publication of the notice thereof required by law.

L. 1896, c. 908, §§ 250, 251; Charter (1901) N. Y. City, § 906.

184—Q. *When is this tax payable in New York City?*

A. Some time between September 1 and November 1. Generally, about October 1.

Charter (1901) of New York City, 911-915.

185—Q. *Is an Estate subject to taxation before the probate of the Will?*

A. Yes. An Executor is properly taxable between the death of his testator and the time of the probate of the Will.

Peo. *ex rel.* Gould *v.* Barker, 150 N. Y. 52.

186—Q. *Are Executors to pay taxes on real estate?*

A. Unless the Will otherwise provides, Executors must only pay the taxes on real estate which were a lien prior to death of the Testator.

Coleman *v.* Coleman, 5 Redf. 524; C. 2719.

187—Q. *For what other taxes are Executors responsible?*

A. There is a Federal or United States Inheritance tax to which many estates are subjected.

188—Q. *Should Executors pay taxes promptly?*

A. Yes, because there are almost always discounts for prompt payment and penalties for deferred payment.

189—Q. *Are Executors personally responsible for penalties incurred by delayed payment of taxes?*

A. Yes, if they had the funds available with which to pay the tax.

Tickel *v.* Quin, 1 Dem. 425.

(j) Partnership property.

190—Q. *Should an Executor continue to conduct the business of a deceased partner?*

A. No. If the deceased had no partners, it will be the duty of the Executor to turn the assets of the business into cash and liquidate the same, but not to incur any new responsibilities, or to undertake any new ventures in the absence of express authority from the Testator, except such as are required to arrive at the best commercial results.

Hannahs *v.* Hannahs, 68 N. Y. 610; Willis *v.* Sharp, 113 N. Y. 586; Matter of Sharp, 5 Dem. 516.

191—Q. *If the deceased had partners what are the Executor's duties?*

A. The Executor has nothing to do with the settlement of the partnership. The surviving partners conduct the entire matter, and must account to the Executor. In the absence of special circumstances, they cannot undertake any new obligations, or subject the estate to any new liability.

Williams *v.* Whedon, 109 N. Y. 333; Russell *v.* McCall, 141 N. Y. 437; Waring *v.* Waring, 1 Redf. 205; Camp *v.* Fraser, 4 Dem. 212.

192—Q. *May a surviving partner make an assignment for the benefit of creditors without consulting the Executor?*

A. Yes.

Williams *v.* Whedon, 109 N. Y. 333.

193—Q. *What suggestion is it proper for an Executor to make to a surviving partner?*

A. It is usual to suggest that an expert be called in to go over the books of the firm as soon as possible, in order to determine the interest of the deceased. There is nothing improper in such a request, and it is a sound business move, both for the partners and the estate, in every case where the decedent had a substantial interest in the partnership.

194—Q. *Within what period can an Executor compel surviving partners to pay out the interest of a decedent?*

A. There is no fixed period within which such a demand may be made. The law gives to the partners a reasonable time to settle their business matters, and what this is will depend upon special circumstances in every case. If the Executor thinks that the surviving partners are unduly delaying, or if, for any other reason, he suspects mismanagement, he can always call upon them to account before a proper court.

Williams *v.* Whedon, 109 N. Y. 333.

195—Q. *May an Executor sell the interest of his Testator in a partnership to the partners, even where some of them are Executors?*

A. Yes. Always provided that the Testator's estate obtains a fair value for the interest sold.

Geyer *v.* Snyder, 140 N. Y. 394.

196—Q. *Must creditors of a partnership exhaust their remedies against partnership property before they can claim any right to a share in the individual estate of a deceased partner?*

A. Yes, unless the partnership is insolvent.

R. 556; Pope *v.* Cole, 55 N. Y. 124.

197—Q. *Has an Executor a right to examine the books of a partnership to ascertain Testator's interest therein?*

A. No, unless by special order of Court.

Waring *v.* Waring, 1 Redf. 205; Kastner *v.* Kastner, 53 App. Div. 293.

198—Q. *How can the interest of a deceased partner be determined?*

A. By a formal accounting, and an Executor may examine a surviving partner to ascertain terms of partnership, in order to bring action for an accounting.

Sands *v.* Miner, 16 App. Div. 347 (160 N. Y. 693); Kastner *v.* Kastner, 53 App. Div. 293.

199—Q. *Is such action necessary for the protection of the Executor?*

A. No. He may accept the informal account of the surviving partners, and receive payment thereunder without binding the estate, and in case it be discovered later that he should have received more, it can be recovered.

200—Q. *Is the individual estate of a deceased partner liable for the whole indebtedness of the partnership or only in proportion to the interest of the deceased partner?*

A. The estate is liable for all the partnership debts, but personal creditors have pref-

erence over partnership creditors in payment out of separate estate of any deceased partner.

2 Collyer's Law of Partnership, § 627.

201—Q. *Has an Executor any right to payment for partnership name?*

A. The use of partnership or business name may be continued in either of the following cases:

1. Where the business of any firm or partnership in this State, having business relations with foreign countries or which has transacted business in this State for not less than three years, continues to be conducted by some or any of the partners, their assignees or appointees;

2. Where a majority of the members, general or special, of a general or limited partnership formed under the laws of this State, or of the stockholders of any corporation, domestic or foreign, which may theretofore have carried on its business within this State, and where said general or limited partnership or corporation has discontinued or shall be about to discontinue its business within the State, and where a majority of the partners, general or special, in either of such last mentioned co-partnerships, or of the survivors thereof, shall be members of the new

limited co-partnership, or where a majority of the members of such co-partnership theretofore existing or of the surviving members thereof or of the stockholders of such corporation shall consent in writing to the use of such firm or corporate name by the new limited partnership; or

3. Where any resident of this State dies, who at the time of his death, and for at least five years immediately prior thereto, conducted and carried on in his sole name any business in this State, or who at the time of his death so conducted and carried on any business having relation with other states or foreign countries, the right to use the name of such person for the purpose of continuing and carrying on such business, shall survive and pass and be disposed of and accounted for as part of the personal estate of such deceased person, and such business may be continued and carried on under such name by any person who comes into the legal possession thereof.

L. 1897, c. 420, § 20; Kirkman *v.* Kirkman, 20 Misc. 211. (26 App. Div. 395.)

202—Q. *What is the Executor's right in trademarks, labels, etc., held in firm name?*

A. They are assets of the firm and the Executor should receive the proportion due the

deceased partner, as in case of other assets.

Huwer *v.* Dannenhoffer, 82 N. Y. 499; Hazard *v.* Caswell, 93 N. Y. 259, 265.

203—Q. *When a Will conflicts with articles of copartnership, which governs the partnership interest?*

A. The articles of copartnership.

204—Q. *May an Executor ever become a partner?*

A. Yes, if the Will so directs.

Willis *v.* Sharp, 113 N. Y. 586; 115 N. Y. 396. Columbus Watch Co. *v.* Hodenpyl, 135 N. Y. 430.

205—Q. *Is an Executor justified in allowing funds of the estate to remain in surviving partner's hands as a loan?*

A. Not without express and unmistakable authority in the Will.

Willis *v.* Sharp, 113 N. Y. 586.

(k) Accounting.

206—Q. *When should an Executor account?*

A. Unless some one interested in the estate calls upon him to do so, he is not compelled to account at any particular time. The matter is largely discretionary.

207—Q. *What is an "intermediate account"?*

A. It is an account rendered by an Executor intended to disclose the condition of the estate, but not made the subject of judicial settlement.

C. 2514.

208—Q. *What is the judicial settlement of an account?*

A. It signifies a decree of a Surrogate's court whereby the account is made conclusive upon the parties; and an account thus made conclusive is said to be "judicially settled."

C. 2514, subd. 8.

209—Q. *When may an Executor file an intermediate account?*

A. At any time.

C. 2725.

210—Q. *When may he apply to have his account judicially settled?*

A. When one year has elapsed since letters were issued to him.

When notice requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof, to such Executor or Administrator has been duly published according to law.

C. 2728, 2718; Matter of Buck, N. Y. Law Journal Dec. 26, 1899.

211—Q. *When may he be compelled to file an intermediate account?*

A. 1. Where an application for an order permitting an execution to issue on a judgment against the Executor or Administrator has been made by the judgment creditor.

2. On the return of a citation, issued on the petition of a judgment creditor, praying for a decree granting leave to issue an execution on a judgment rendered against the decedent in his lifetime.

3. On the return of a citation issued on the petition of a creditor, or person entitled to a legacy, or other pecuniary provision, or a distributive share, praying for a decree directing payment thereof.

4. Where eighteen months have elapsed since letters were issued and no special proceeding, on a petition for a judicial settlement of the Executor's or Administrator's account, is pending.

C. 2725.

212—Q. *When may he be compelled to have his account judicially settled?*

A. 1. Where one year has expired since letters were issued to him.

2. Where letters issued to him have

been revoked, or, for any other reason, his powers have ceased.

3. Where a decree for the disposition of real property, or of an interest in real property has been made, as prescribed in title fifth of this chapter, and the property, or a part thereof, has been disposed of by him, pursuant to the decree.

4. Where he has sold or otherwise disposed of any of the decedent's real property, or the rents, profits or proceeds thereof, pursuant to a power contained in the decedent's Will, where one year has elapsed since letters were issued to him.

C. 2726.

213—Q. *Can an Executor prepare and file his own account without legal aid?*

A. Theoretically, he can; practically, he cannot. To obtain a proper discharge, any Executor not familiar with legal procedure should seek advice of competent counsel.

214—Q. *May Executors account separately?*

A. Yes; but when they do, their co-Executors must be summoned to attend the accounting.

C. 2728.

215—Q. *Must an Executor have a voucher or receipt for every payment he has made?*

A. Yes, for all payments over $20.

C. 2729.

216—Q. *Is there no exception to this rule?*

A. Yes. If an Executor has failed to obtain a receipt, or, if it has been lost or destroyed, he may, on proper proof of the facts, be allowed the payment. Strict proof is, however, required, and it will save the Executor trouble and annoyance to use care in taking and preserving vouchers and receipts.

C. 2729.

217—Q. *Who may object to an Executor's accounts?*

A. Any one interested in the estate, including a creditor.

C. 2728, 2514.

218—Q. *If no one else objects to an item in the Executor's accounts, may the Surrogate himself do so?*

A. Yes.

219—Q. *May the Surrogate on his own initiative require an Executor to account?*

A. Yes, he may compel an intermediate accounting.

6 Dem. 506.

220—Q. *What is the usual procedure on an Executor's accounting?*

A. (1) The Executor prepares his accounts according to the forms and rules of the Surrogate's Court, and files it in that court, with all vouchers in support of it, with a petition asking that his account be settled and the proper parties notified to attend.

(2) The Court then issues a formal notice to attend (citation) on a certain day, and this notice must be addressed to and duly served upon all the necessary parties.

(3) The Court will receive objections to the account, and either pass on them itself or send the account to some Referee, who will examine it and report to the Court.

(4) The Court will then issue a decree approving or disapproving the account.

(5) Where all the parties interested are of age, and have no objections to the account, they can waive formalities and consent to a decree discharging the Executor.

221—Q. *When an Executor's account has been passed by the Surrogate, is the decree conclusive of every matter contained in the account?*

A. It is in the following respects, as against all parties properly before the Court:

1. That the items allowed to the accounting party, for money paid to creditors, legatees, and next of kin, for necessary expenses, and for his services, are correct.

2. That the accounting party has been charged with all the interest for money received by him, and embraced in the account, for which he was legally accountable.

3. That the money charged to the accounting party as collected is all that was collectible, at the time of the settlement, on the debts stated in the account.

4. That the allowances made to the accounting party for the decrease, and the charges against him for the increase, in the value of property were correctly made.

C. 2742.

The accounts, however, may be reopened for proper cause, where any injustice has been done or error committed.

C. 2481, subd. 6; Matter of Hawley, 100 N. Y. 206; Matter of Henderson, 157 N. Y. 423.

222—Q. *How often should an Executor account?*

A. He should do so whenever any occurrence of interest to those entitled to share in the

estate, would seem to make it proper. The matter is discretionary.

223—Q. *Who bears the expense of an accounting?*

A. The estate, except when the Executor is held personally responsible by reason of neglect, default or the like.

224—Q. *Is an accounting an expensive procedure?*

A. If there is no litigation, it is not expensive. Litigation may make it very costly.

(l) Miscellaneous.

225—Q. *What is the average length of time it takes to settle an estate?*

A. This cannot be answered. Every estate differs. A simple estate with no complications ought to be easily administered in one year by any industrious Executor. There is, however, no standard in the matter.

226—Q. *When everything is friendly and the estate is merely a family affair, should the Executor go through all the formalities prescribed by law as he would with strangers?*

A. Unquestionably he should.

227—Q. *Why?*

A. Because the things to be done in a simple estate where everything is amicable are very few, and there can be no excuse for not doing them. No one can tell when amicable relations may cease, or what new circumstances may arise which may place the Executor in a very embarrassing position if he has neglected legal formalities.

228—Q. *What is the remuneration of an Executor?*

A. In New York he receives five per cent. on the first thousand dollars received and paid out, two and one-half per cent. on the next ten thousand dollars, and one per cent. on all over eleven thousand. Administrators, trustees and guardians receive the same compensation.

C. 2730, 2802, 2850; Matter of Johnson, 57 App. Div. 494.

229—Q. *If there are two or more Executors, does each one receive this compensation?*

A. If the personal estate amounts to $100,000 over all debts, and there are not more than three Executors, each one is entitled to full commissions; if there are more than three Executors, they must divide three full commissions among them in proportion to the services performed by

each. If the personal estate does not amount to $100,000, only one Executor is entitled to full fees. If there be more than one Executor, commissions for one are equally divided.

C. 2730.

230—Q. *Is an Executor who has been left a legacy in place of fees obliged to accept it?*

A. No. But if he does not accept the legacy in place of his fees, he must file a written declination of the legacy.

C. 2730.

231—Q. *May an Executor be removed?*

A. Yes, for incompetency, waste, improper investments, bad management, drunkenness, improvidence, disobedience to court orders, removal from the State, pecuniary irresponsibility, and other causes.

C. 2685.

232—Q. *May an Executor examine persons under oath to discover assets of an estate?*

A. Yes. Under proper circumstances, he may obtain an order allowing him to make such examination.

C. 2707.

233—Q. *Is an Executor responsible if he is robbed of assets in his possession?*

A. Not if he has taken such precautions as a reasonably prudent man may adopt. What such precautions are depends upon the opportunities and facilities of the Executor for safe-guarding the property.

McCabe *v.* Fowler, 84 N. Y. 314.

234—Q. *Can Executors make executory contracts so as to bind the estate in the absence of express instructions under the Will?*

A. No.

O'Brien *v.* Jackson, 167 N. Y. 31.

235—Q. *Is a purchaser of personal property protected in buying from an Executor or Trustee?*

A. Yes, if he is an innocent purchaser in good faith, and for value he obtains good title to what he purchases from an Executor or Trustee, and is not responsible if the Executor or Trustee misapplies proceeds.

Leitch *v.* Wells, 48 N. Y. 585; Sutherland *v.* Brush, 7 Johns, Ch. 17; L. 1896, c. 547, § 88.

236—Q. *Where there are several Executors, which one is entitled to the physical possession of the assets?*

A. No one Executor is entitled to exclusive control. It is usual for Executors to arrange between themselves for the custody of the property. If they disagree, the Sur-

rogate will make proper provision for their joint custody.

C. 2602.

237—Q. *Should Executors ever borrow money for the estate?*

A. There are cases where such a transaction has been approved, but in general it is not permitted.

Barry *v.* Lambert, 98 N. Y. 300; Adair *v.* Brimmer, 74 N. Y. 539, Bryan *v.* Stewart, 83 N. Y. 270.

238—Q. *Can an Executor confer his authority on another person or act by attorney?*

A. No. It is a personal power, and cannot be delegated.

Newton *v.* Bronson, 13 N. Y. 587; Whitlock *v.* Washburn, 62 Hun, 369.

239—Q. *Who are "heirs-at-law"?*

A. They are the relatives who succeed to the real property of a person who leaves no Will. Very often the "heirs-at-law" and the "next of kin," who succeed to the personal estate, (Q. 267) are the same persons. Just who those persons are must be determined in every instance by an examination of the Statutes of Descent and Distribution (Q. 263, 488).

Red. 80.

240—Q. *Does an Executor or Trustee avoid individual responsibility by signing "as Executor" or "as Trustee"?*

A. No. The title is merely descriptive, and if the Executor or Trustee has not power to bind his estate, no such description will protect him from personal responsibility (Q. 69).

O'Brien *v.* Jackson, 167 N. Y. 31; Met Trust Co. *v.* McDonald, 52 App. Div. 424.

241—Q. *May an Executor be examined under oath by an interested party in order to enable such person to frame objections to the Executor's account?*

A. Yes. On a proper showing, the Court may at any time order the Executor to attend and be examined touching any matter relating to his administration of the estate, or touching any personal property owned or held by the decedent at the time of his death. Of course, such an order will not be made merely upon demand, but only for good cause shown.

C. 2729, sub. 2.

242—Q. *What property is not deemed assets in the hands of the Executor?*

A. The law provides that when a person dies leaving widow, husband or minor chil-

dren, certain property, like spinning-wheels, sewing machine, stoves, Bible, family pictures and school books, not worth more than $50, certain live stock and food and wearing apparel and furniture not worth in all over $300, shall be exempt, under certain specified conditions. Where none of these articles exists pecuniary equivalent is allowed.

C. 2713; Matter of Williams 31 App. Div. 617.

243—Q. *In what Courts may an Executor account?*

A. In either the Surrogate's or the Supreme Court.

C. 217, 2472.

244—Q. *Should an Executor promptly obey all orders of Court?*

A. Yes, he should instantly and literally comply with all court orders. If he does not, he may be adjudged guilty of contempt and suffer severe penalties.

C. 2266, 2481.

CHAPTER III.

ADMINISTRATORS.

The preceding Questions and Answers affecting Executors apply, with but few exceptions, to Administrators. The rights and duties of Executors and Administrators are practically the same.

245—Q. *What is an Intestate?*

A. It is the term used to describe a person who leaves no valid Will. Where it is used with respect to particular property it means a person who died without effectually disposing of that property by Will, whether he left a Will or not.

C. 2514.

246—Q. *What is an Administrator?*

A. He is a person appointed by the Court to take charge of the Estate of a person who dies intestate, or where, for some reason, the Executor cannot or does not act.

247—Q. *Are the powers and liabilities of an Administrator the same as those of an Executor?*

A. In almost every particular they have the

same power and liability as Executors, and the same rules should govern their conduct.

C. 2613; Jackson *v.* Robinson, 4 Wend. 436

248—Q. *Who are entitled to Letters of Administration?*

A. Administration must be granted to the relatives of the deceased in the following order:

1. To the surviving husband or wife.
2. To the children.
3. To the father.
4. To the mother.
5. To the brothers.
6. To the sisters.
7. To the grandchildren.
8. To any other kin entitled to share in his estate.
9. To the Executor or Administrator of a sole legatee named in a Will whereby the whole estate is devised to such deceased sole legatee.
10. To the creditor first applying.
11. To the County Treasurer.

In the City of New York the Public Administrator has preference after the next of kin and after the Executor or Administrator of a sole legatee of the whole estate over creditors. If several persons of the same degree of kindred are

entitled to Administration, they are preferred as follows:

1. Men to women.

2. Relatives of the whole blood to those of the half blood.

3. Unmarried women to married.

(See Q. 26.)

C. 2660.

249—Q. *Who are incompetent to be Administrators?*

A. A person convicted of an infamous crime, any one incapable by law of making a contract, a person not a citizen of the United States, unless he is a resident of the State, a person under twenty-one years of age, or who is adjudged incompetent by the Surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding.

C. 2661.

250—Q. *Must an Administrator file a bond?*

A. He must. (Q. 42-54.)

C. 2664.

(a) Temporary Administration.

251—Q. *What is a Temporary Administrator?*

A. He is a person appointed by the Court to

take charge of an estate pending the appointment of an Executor or a permanent Administrator.

C. 2670.

252—Q. *Who may act as Temporary Administrators?*

A. Any persons competent and qualified to act as Administrators (Q. 249).

C. 2670.

253—Q. *What are the powers of a Temporary Administrator?*

A. In general, a Temporary Administrator has only such powers as are specially delegated to him by the Court.

C. 2672, 2673, 2674, 2675, 2676, 2677.

254—Q. *May a Temporary Administrator make investments?*

A. No.

Baskin *v.* Baskin, 4 Lansing, 90.

255—Q. *How must a Temporary Administrator deposit his funds?*

A. If he is appointed by a Surrogate's Court in any county except New York they must be deposited with some person, bank, or domestic incorporated Trust Company designated by the Surrogate within ten

days after they come into his hands. Where he is appointed by the Surrogate of New York, the deposit must be made in a domestic incorporated Trust Company having its office in New York, and especially approved and designated by the Surrogate, or designated in the general rules of practice as a depositary of funds paid into Court.

C. 2678.

256—Q. *If a Temporary Administrator does not make his deposit as indicated in the last answer, what is the liability of the Administrator?*

A. He is liable to removal and arrest.

C. 2679, 2685.

257—Q. *How can money deposited by a Temporary Administrator be withdrawn?*

A. Only by special order of the Surrogate.

C. 2680.

258—Q. *When can a Temporary Administrator be compelled to account?*

A. At any time.

C. 2726.

(b) Administration with Will annexed.

259—Q. *What is an Administrator with the Will annexed?*

A. He is a person appointed by the Surrogate to take the place of an Executor who has died, resigned, renounced, or been removed, or to act as Executor of a Will where the Will itself names no Executor.

C. 2643.

260—Q. *Who are entitled to administration with the Will annexed?*

A. 1. One or more of the residuary legatees, who are qualified to act as Administrators. If any one of such legatees who would otherwise be so entitled is a minor, administration shall be granted to his guardian, if competent.

2. If there is no such residuary legatee or guardian, or none who will accept, then to one or more of the principal or specified legatees so qualified. If any one of such legatees who would be otherwise so entitled is a minor, administration shall be granted to his guardian, if competent.

3. If there is no such legatee or guardian, or none who will accept, then to the husband, or wife, or to one or more

of the next of kin, or to one or more of the heirs or devisees, so qualified.

4. If there is no qualified person entitled under the foregoing subdivisions who will accept, then to one or more of the creditors who are so qualified, except that in the counties of New York and Kings the Public Administrator shall have preference, after the next of kin, over the creditors and all other persons.

5. If there is no qualified creditor who will accept, then to any proper person designated by the Surrogate.

C. 2643.

261—Q. *What powers do Administrators with the Will annexed possess?*

A. In general, they have the same powers and duties as though they had been named in the Will as Executors.

C. 2613.

262—Q. *Suppose an Executor has been given power of sale under a Will, does this power of sale pass to the Administrator with the Will annexed?*

A. Yes, unless the terms of the Will show some peculiar reliance on, or confidence in, the individual named as Executor, from which it is to be inferred that the Testator

desired only that individual to execute the power, it will pass to the Administrator with the Will annexed.

C. 2613; Mott *v.* Ackerman, 92 N. Y. 539.

263—Q. *If a person die intestate, what becomes of the surplus of his personal property after the payment of his debts?*

A. The personal property of persons dying without Wills, or leaving Wills with a surplus after the payment of debts and legacies not bequeathed, must be disposed of as follows:

1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children, if any of them have died before the deceased.

2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parents, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow

shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive, in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. If there be no widow and no children, and no representatives of a child, the whole surplus shall be distributed in equal shares to the next of kin, in equal degree to the deceased, and their legal representatives.

6. If the deceased leave no children, and no representative of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representative of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole if there be no widow.

8. If the deceased leave a mother, and no child or descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

9. If the deceased was illegitimate, and leave a mother, and no child, or descendant, or widow, such mother shall take the whole, and shall be entitled to Letters of Administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to Letters of Administration in the same order.

10. Where the descendants, or next of kin of the deceased, entitled to share in his estate are all in equal degree to the deceased, their shares shall be equal.

11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take

in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate.

13. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the life-time of the deceased, and had survived him.

15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.

16. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such

next of kin shall be deemed next of kin for all the purposes specified in this chapter; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person.

C. 2732; Birdseye, R. S. 1386 (3d ed.).

(c) Ancillary letters.

264—Q. *What are Ancillary Letters?*

A. Where a Will of personal property made by a person who resided without the State of New York at the time of its execution or at the time of his death, has been admitted to probate within the foreign country or within the State, or the territory of the United States, where it was executed or where testator was a resident at time of his death, the Surrogate must, on proper papers, record the Will and the foreign letters and issue thereon Ancillary Letters testamentary, or Ancillary Letters of Administration with the Will annexed, as the case requires.

C. 2695.

265—Q. *To whom are these letters to be issued?*

A. If the will specially appoints an Executor with reference to personal property in this State, that person is preferred. Otherwise, generally to the person named in the foreign letters.

C. 2697.

266—Q. *What are the powers of persons so appointed?*

A. In general the same as any Executor or Administrator, except in regard to the sale of real estate.

C. 2702.

267—Q. *Who are "next of kin?"*

A. All those persons entitled under the provisions of the law relating to the distribution of personal property (See Q. 263) to share in the unbequeathed assets of a decedent after payment of debts and expenses, other than a surviving husband or wife.

C. 1870, 1905, 2514.

CHAPTER IV.

TRUSTEES.

(a) Qualifications, renunciation and resignation.

268—Q. *What is a Trustee nominated in a Will called?*

A. A Testamentary Trustee.

C. 2514, subd. 6.

269—Q. *Is a Trustee under a Will always an Executor?*

A. Not always. But the same person is usually appointed to both offices.

C. 2514, subd. 6.

270—Q. *May an Executor who is also nominated as a Trustee act as Executor and refuse to act as Trustee?*

A. Yes.

Matter of Green, 4 Redf. 357.

271—Q. *Is this usual?*

A. It is very unusual.

272—Q. *What is the acceptance of the office of Trustee called?*

A. Qualifying.

273—Q. *What constitutes the act of qualifying as a Trustee?*

A. Usually taking the oath of office as Executor, and doing some act under the trust. A Trustee not named as Executor need take no oath, and acts without special court authority other than probate of the Will.

C. 2594, 2636.

274—Q. *What, if anything, must a person nominated as Trustee do to show his declination of the office?*

A. He need not do anything. But it is better to file a written declination of the trust.

C. 2639, 2642; Fleming *v.* Burnham, 100 N. Y. 1; Jessup, 1184; English *v.* McIntyre, 29 App. Div. 439.

275—Q. *What happens when a Trustee declines to act?*

A. The proper Court will appoint a person to perform the trust, if there are no persons nominated in the Will capable of acting and willing to act.

C. 2472, 2818; Ross *v.* Roberts, 2 Hun, 90 (63 N. Y. 652); De Peyster *v.* Clendining 8 Paige 294.

276—Q. *Will a trust ever fail because of the neglect or refusal of a Trustee to act?*

A. Never.

De Peyster *v.* Clendining, 8 Paige 294; Kirk *v.* Kirk, 137 N. Y. 510; Myers *v.* McCullagh, 63 App. Div. 321.

277—Q. *What are the qualifications for a Trustee?*

A. Same as Executor. (Q. 20-28.)

C. 2612.

278—Q. *Who cannot act as Trustees?*

A. There is no special restriction in the Statute. But Trustees may be removed if Letters Testamentary would not issue to them by reason of personal disqualification or incompetency. (See Q. 20-28.)

C. 2817.

279—Q. *Should a Trustee who cannot personally attend to his duties qualify?*

A. No.

280—Q. *Why not?*

A. The same reasons that should forbid an Executor from acting should forbid a Trustee from occupying a merely nominal position. (See Executors, Q. 54-57.) But there is also the additional reason that Trustees, unlike Executors, cannot act independently of one another, and an inactive Trustee would be obliged sometimes to take responsibilities.

281—Q. *Is one Trustee liable for the acts of another?*

A. No. Unless he is cognizant of some wrong-doing or default and permits it,

or in some way countenances it. In England a different rule prevails, and Trustees are held responsible for each other's neglect or default.

Wilmerding *v.* McKesson, 103 N. Y. 329; Matter of Brown, 16 Abb. Pr. N. S. 457.

282—Q. *Can Trustees act separately?*

A. No.

Ridgeley *v.* Johnson, 11 Barb. 527; Stout *v.* Rider, 12 Hun, 574; Brennan *v.* Willson, 71 N. Y. 502 (507); Wilder *v.* Ranny, 95 N. Y. 7; L. 1896, c. 547, § 146.

283—Q. *Must a Trustee give bonds?*

A. No. But upon proper cause shown any person interested in the trust may petition for such security from the Trustee. (See Executors, Q. 42-54.)

C. 2815, 2638; Matter of Weil, 49 App. Div. 52.

284—Q. *May a Trustee resign?*

A. Yes; but his resignation will not be accepted without good cause.

C. 2814; Matter of Cutting, 49 App. Div. 388.

285—Q. *For what causes may he be removed?*

A. 1. Where, if he was named in a Will as Executor, letters testamentary would not be issued to him, by reason of his personal disqualification or incompetency.

2. Where, by reason of his having wasted

or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge, or by reason of other misconduct in the execution of his trust, or dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his trust.

3. Where he has failed to give a bond as required by a decree, made as prescribed in the last two sections; or has wilfully refused, or without good cause neglected, to obey a direction of the Surrogate, contained in any other decree, or in an order made as prescribed in this title; or any provision of law relating to the discharge of his duty.

C. 2817; Hooley *v.* Gieve, 9 Daly, 104; affirmed, 82 N. Y. 625; Matter of Cohn, 78 N. Y. 248; Matter of Cady, 36 Hun, 122; affirmed, 103 N. Y. 678. See L. 1896, c. 547, § 92.

286—Q. *If the Trustee is also the Executor, does his resignation or removal as Trustee affect him as Executor?*

A. No, except in the following cases:

1. Where he presents a petition praying for the revocation of his letters, he may also, in the same petition, set forth the facts, upon showing which he would

be allowed to resign as Testamentary Trustee; and may thereupon pray for a decree allowing him so to resign, and for a citation accordingly.

2. Where a person presents a petition praying for the revocation of letters issued to an Executor or Administrator; and any of the facts set forth in the petition are made sufficient to entitle the same person to present a petition praying for the removal of a Testamentary Trustee; the petitioner may pray for a decree removing the person complained of in both capacities, and for a citation accordingly.

In either case, proceedings upon the petition for the resignation or removal, as the case requires, of the Testamentary Trustee, and for the judicial settlement of his account, may be taken in connection with, or separately from, the like proceedings upon the petition for the revocation of the letters, as the Surrogate directs.

C. 2819.

(b) Investments.

These questions and answers apply equally to Executors and Guardians.

287—Q. *In what may a Trustee invest?*

A. In the absence of special directions under

the Will, his authority is the same as that of Executors. He is limited in New York to State and United States Bonds, obligations of cities of this State issued pursuant to law, and loans on real estate.

Red. 504; L. 1897, c. 417, § 9; Matter of Wotton, 59 App. Div. 584 (167 N. Y. 629), King *v.* Talbot, 40 N. Y. 76.

288—Q. *How should a Trustee interpret instructions for investment under a Will?*

A. If the Will provides for investments not authorized by law the Trustee cannot exercise too much caution in following the instructions. The Courts of New York have made very strict rulings in this regard, and unless the Trustee is perfectly sure that the Will gives him authority to make a certain investment, he should content himself with the investments allowed by law.

Matter of Keteltas, 1 Con. 468; Matter of Cant. 5 Dem. 269; Matter of Hall, 164 N. Y. 196.

289—Q. *Can a Trustee be held personally liable for loss from investment in securities authorized by law?*

A. Not unless he is negligent. Of course, an investment, good when made, may become less valuable through inattention or unwise handling. In such case the Trus-

tee might be held responsible. (See Mortgages for particular illustration of this point Q. 293-330.)

290—Q. *Should a Trustee ever take any risks in investing funds for his estate?*

A. He should not. The cases in New York are filled with stories of Trustees who have come to grief by trying "to make money" for their estates. A Trustee is appointed to preserve funds, and he should avoid anything that has even the appearance of speculation.

Warren *v.* Union Bank, 157 N. Y. 259; Matter of Hall, 164 N. Y. 196.

291—Q. *What are the safest investments?*

A. (1) United States Government Bonds, (2) New York State bonds, (3) obligations of cities of this State. These are, however, low interest bearing securities.

292—Q. *If a Trustee finds the trust estate invested in securities not authorized by law, should he allow these investments to remain, or should he re-invest in securities allowed by law?*

A. Save in exceptional cases, he should re-invest.

Matter of Wotton, 59 App. Div. 584 (167 N. Y. 629).

(1) Mortgages.

293—Q. *What is the best income-bearing security allowed by law?*

A. Loans secured by first Mortgage on real estate.

294—Q. *What is a person making a Mortgage called?*

A. The Mortgagor.

295—Q. *What is a person loaning on Mortgage called?*

A. The Mortgagee.

296—Q. *What rate of interest do Mortgages pay?*

A. From four per cent. to six per cent., depending upon the character of property.

297—Q. *What information should Trustees seek in determining whether or not any particular mortgage is a good investment?*

A. 1. He should determine by the best means at hand the actual selling value of the premises.

2. He should ascertain as accurately as possible the financial responsibility of the owner of the premises.

3. He should ascertain that the title to the property is good.

298—Q. *How should he ascertain whether the title is good?*

A. He should employ competent counsel, who should be requested to examine the title and have it guaranteed by some responsible Title Company to the amount of the loan.

299—Q. *What precautions should a Trustee take after he has made a loan by way of mortgage on any property?*

A. 1. He should see that it is kept fully covered by insurance to the amount of his loan.

2. He should see that the taxes and assessments are promptlv paid.

3. He should see that interest is promptly paid.

4. In case of loss by fire he shcuid promptly collect fire insurance moneys, and hold and apply same for benefit of his loan.

Matter of Olmstead, 52 App. Div. 515.

300—Q. *Who should bear the expense of searching title, etc.?*

A. The person borrowing should bear all expenses of every kind; the Trustee should not be called upon to pay anything.

301—Q. *Why is it important to see that taxes and assessments are paid?*

A. Because they take precedence over all other claims against the property, including the Mortgage, and if they are allowed to run unpaid they are subject to heavy interest charges and penalties, which seriously impair the security of the Mortgage.

302—Q. *How can a Trustee discover if taxes and assessments have been paid?*

A. He may request the Mortgagor to exhibit his tax receipts every year.

303—Q. *Can the owners of property be compelled to show their tax receipts to the mortgagees?*

A. No, but it is quite usual for them to do so. The Trustee can discover from the tax books whether taxes against property are paid, and he should not fail to do so, if he has not personally examined the tax receipts.

304—Q. *When should he make such examination?*

A. Some time within ninety days after the tax is payable.

305—Q. *Is the Trustee justified in employing a competent person to discover if taxes have been paid?*

A. Yes, the Court would probably allow a small charge for the purpose, especially where a proper search requires special knowledge and training as in large communities like New York City.

306—Q. *What percentage of the value of property should be loaned on Bond and Mortgage?*

A. Savings Banks are by law forbidden to loan over fifty per cent. of the fair market value of improved property, and not over forty per cent. of unimproved and unproductive property. In established active localities in the City of New York loans are frequently made as high as eighty per cent. of the value. As a rule, however, it is not safe to loan over two-thirds of the actual selling value on city property and not over sixty per cent. on country property.

L. 1892, c. 689, § 116.

307—Q. *What are the best methods for a Trustee to employ in ascertaining the actual selling value of property?*

A. If he has no special knowledge himself he must rely largely on the opinion of expert appraisers. For improved property the rent is usually a fair indication of value. The amount at which

the property is assessed for the purpose of taxation is another guide.

308—Q. *Is a Trustee justified in incurring expense for appraisement?*

A. Yes, if necessary. But in case the mortgage is accepted, it is quite usual for the mortgagor to pay this expense. Sometimes the proposed mortgagor will provide funds for appraisal in offering his property as security.

309—Q. *Should a Trustee ever take mortgages on unimproved real estate?*

A. He may do so, but he should take a hint from the law relating to Savings Banks, which allows only forty per cent. to be loaned on property of this character.

310—Q. *Should a Trustee take a mortgage when the owner of the property is financially irresponsible or a "dummy?"*

A. The value of the property is the main security. A responsible bondsman increases the security and is therefore desirable. The irresponsibility of an owner should put the lender on his guard. A "dummy" usually indicates that the real owner fears to go on the bond. This should also put the lender on his guard,

but whether it is a fatal objection or not is a matter for individual discretion.

311—Q. *If a Trustee cannot personally attend to the details of his investments and still desires to invest on Bond and Mortgage, what should he do?*

A. He should buy mortgages guaranteed as to principal and interest by some responsible institution.

312—Q. *What does such guaranteeing of mortgages cost?*

A. About one-half of one per cent. a year.

313—Q. *What is an assignment of a mortgage?*

A. It is the paper by which title to a mortgage is transferred.

Strause *v.* Josephthal, 77 N. Y. N. Y. 622.

314—Q. *May Trustees assign mortgages?*

A. Yes.

Corwin *v.* Wesley, 34 N. Y. Super. Ct. 109.

315—Q. *Should they do so?*

A. Not unless the assignment is made "without recourse" as to them. There have been some decisions which hold that assignments of mortgage carry with them certain guarantees which no Trustee

should assume, and the phrase above quoted is intended to obviate this.

Stillwell *v.* Northrup, 109 N. Y. 473 (482); Corwin *v.* Wesley, 34 N. Y. Super, 109 Craig *v.* Parkis, 40 N. Y. 181.

316—Q. *May a Trustee invest in mortgages on property outside of his own State?*

A. The Courts do not look favorably on such investments.

Ormiston *v.* Olcott, 84 N. Y. 339.

317—Q. *When the period for which a mortgage is made expires, that is to say, when it matures, may the time of payment be extended if the security is still good?*

A. Yes. But unless the investment is particularly desirable it is generally better to have it payable on demand than at some future definite time.

318—Q. *What precaution should a Trustee take in extending the time of payment of a mortgage?*

A. If the property has changed owners since the original mortgage was made, the former owner should consent to the extension and the new owner should also become a bondsman.

Matter of Olmstead, 52 App. Div. 515.

319—Q. *Why is it necessary that the former owner consent to the extension?*

A. Because unless he does so he may possibly be released from his obligation on the bond.

Calvo *v.* Davies, 73 N. Y. 211; Spencer *v.* Spencer, 95 N. Y. 353.

320—Q. *Are mortgages taxable?*

A. Under the law as it exists in New York at present they are theoretically taxable. Practically a large majority of mortgages on record are not subjected to taxation. Technically, mortgages are classed as "debts due from solvent debtors."

L. 1896, c. 908, § 2, subd. 4 (now subd. 5 by L. 1901, c. 490).

321—Q. *Should mortgages always be recorded?*

A. Yes.

322—Q. *Should counsel always be employed by Trustees in dealing with mortgages?*

A. It costs nothing for the Trustee to have the services of a lawyer, all expenses being borne by the borrower, and the Trustee should not fail to obtain the best legal advice. Matters relating to investments on Bond and Mortgage are sometimes very technical, and unless a Trus-

tee has special training in this class of work he is not competent to undertake the work unaided.

323—Q. *What is the Satisfaction of a mortgage?*

A. It is the certificate signed by the holder of a mortgage certifying that it has been paid.

324—Q. *Need a Trustee make any investigation as to who is paying him the amount due on the mortgage before he gives a satisfaction piece?*

A. No. All he need do is to see that he gets a certified check drawn to his order, or cash, for the amount due.

325—Q. *May a Trustee buy a mortgage on real estate?*

A. Yes; but if he does so he should obtain from the mortgagor an "estoppel certificate" or formal acknowledgment in writing of the genuineness of the mortgage, its validity, the amount due thereon, and any other essential facts. It is not safe for anyone to purchase a mortgage without this certificate. He should also take the same precautions to see that the title to the property is good, as he would if the mortgage were being made direct to

him, and in addition he should be satisfied of the title of the assignor to the mortgage itself.

326—Q. *Should Trustees invest in second mortgages on real estate?*

A. No.

327—Q. *Should they invest in mortgages on leasehold property?*

A. No.

Matter of Stark, 39 N. Y. S. R. 393.

328—Q. *How should a Trustee be described in a mortgage?*

A. The mortgage should be made in his name "as Trustee," with the particulars of his Trusteeship added. Thus, John Smith as Trustee under the last will of Thomas Jones.

329—Q. *Are Bonds and Mortgages papers of value?*

A. Yes. They should be carefully preserved. Although the mortgage is always copied in the recording office, the original paper might become most important. For instance, if forgery were claimed it might be indispensable.

(2) Bonds.

330—Q. *What are registered bonds?*

A. They are bonds registered on the books of the corporation issuing them, in the name of the owner, and on which the interest is paid to him by check.

331—Q. *What are coupon bonds?*

A. They are bonds payable to bearer and to which are attached small certificates entitling the bearer to interest as indicated on their face.

332—Q. *Which is the more desirable form of bonds for Trustees?*

A. If a Trustee is making a permanent investment he will find registered bonds more convenient. Being only payable to the Trustee there is also less risk of robbery or loss. If he is only holding for a short investment the coupon bonds will be more desirable, especially as they always sell fractionally higher than the registered bonds.

333—Q. *How are coupons collectible?*

A. They are usually payable at the office of the company. Most banks, however, will receive them for deposit and collect them as though they were checks.

334—Q. *What precaution should a Trustee take in reference to coupon bonds?*

A. He should be careful to note the number of each bond, as in case of loss the number is the only thing by which the bond can be identified.

335—Q. *What credentials should a Trustee show when selling bonds?*

A. No credentials are necessary on sale of coupon bonds. In selling registered bonds it will be necessary for the Trustee to deliver a certificate from the Court appointing him, or a certified copy of the instrument from which he derives his powers. With this proof a purchaser from a Trustee will be protected. But it should be noted that a power to sell does not imply a power to pledge.

Cook, §§ 326, 399, Perry, § 225; Lewin, chap. xviii.; Merchants' Bank *v.* Livingston, 74 N. Y. 223; First Nat. Bank *v.* Nat. Broadway Bank, 156 N. Y. 459.

336—Q. *Is it absolutely necessary for Trustees to supply these papers?*

A. No careful transfer agent will transfer bonds or stock without substantially this proof. Sometimes, however, it will be sufficient to certify that part of the

Will or trust instrument from which the Trustee derives his selling powers.

Cooper *v.* Ill. Cent. R. R. Co., 38 App. Div. 22.

337—Q. *Are all corporate bonds taxable?*

A. No. Certain issues are made expressly exempt from taxation by law. These are usually United States, State or Municipal Bonds. But each State regulates such matters for itself.

338—Q. *If bonds are purchased at a premium, should Trustees reserve a certain portion of the income to counteract this premium?*

A. Not always. The beneficiary is usually entitled to all interest without diminution. It is, however, a matter which depends largely upon the wording of the will.

McLouth *v.* Hunt, 154 N. Y. 179; Matter of Hoyt, 160 N. Y. 607; *Re* Johnson, 57 App. Div. 494; N. Y. Life Ins. & T. Co. *v.* Baker, 165 N. Y. 484.

(3) Stocks.

339—Q. *How is corporate stock transferable?*

A. On the books of the company.

340—Q. *How is this effected by Trustees?*

A. By endorsement upon the back of the certificate, or by formal power of transfer in the exact name of the person in

whose favor the stock is made, which power of transfer must be attached to the stock certificate.

341—Q. *What credentials must a Trustee supply in selling stock?*

A. The same as selling bonds. (Q. 335, 336.)

Cooper *v.* Ill. Cent. R. R., 38 App. Div. 22.

342—Q. *How are dividends collected?*

A. They may be collected in person; but as a rule checks are mailed to stockholders on the filing of instructions to that effect with the treasurer of the company.

343—Q. *Is corporate stock taxable?*

A. Not in the hands of individuals if the corporation is taxed.

L. 1896, c. 908, § 4, subd. 16; Peo. *ex rel.* Trowbridge *v.* Tax Commissioners, 4 Hun, 595; 62 N. Y. 630; Peo. *ex. rel.* Brown *v.* O'Rourke, 31 App. Div. 583, 589.

344—Q. *May a Trustee be a director in a corporation in which he holds stock as a Trustee?*

A. Yes.

Cook, § 623; *Re* Santa Eulalia Co., 4 N. Y. Sup. 174.

345—Q. *If he incur liability as a director, will this fall on him personally, or on the estate?*

A. If the liability be incurred by his own

negligence or default, he will be individually liable.

L. 1892, c. 688, § 54.

346—Q. *May an Executor or Trustee vote on stock even though it has not been transferred on the books of the company into his name?*

A. Yes.

Matter of North Shore Ferry Co., 63 Barb. 556.

347—Q. *Does a stock-dividend declared by a corporation belong to the beneficiaries as income, or should it be held as part of the principal of the Trust Estate?*

A. If the dividend constitutes accumulated earnings or profits it represents income, and should be paid out as such by the Trustee. In questions between what is income and what principal it is generally wiser for Trustees to apply to the Court for instructions. (See Q. 338.)

McLouth *v.* Hunt, 154 N. Y. 179; Matter of Johnson, 58 App. Div. 494.

348—Q. *Must a corporation register stock in the official names of the Executor or Trustee on receipt of proper credentials?*

A. Yes.

Cook, §§ 397, 398.

349—Q. *Is an estate ever liable for debts of a corporation of which it holds stock?*

A. Yes, until the whole capital shall be fully paid.

L. 1892, c. 688, § 54.

(c) Real Estate.

These Questions apply also to Executors, and they should be read in connection with Questions 152-173 which, in general, also apply to Trustees.

350—Q. *For what period may a Trustee make leases?*

A. For any reasonable period within the term of his Trust, provided they contain no extraordinary provisions. In case of doubt he should apply to the Court for instructions.

Labatut *v.* Delatour, 54 How.

351—Q. *May a Trustee make a lease containing a renewal clause?*

A. No.

Matter of McCaffrey, 50 Hun, 371; Gomez *v.* Gomez, 81 Hun, 566 (147 N. Y. 195); Matter of Armory Board, 29 Misc. 174.

352—Q. *What are the essential duties of a Trustee in the care of improved real estate?*

A. 1. To pay taxes (see Taxes).
2. To keep it insured.
3. To keep it rented.
4. To keep it in repair.

353—Q. *What insurance may be carried on improved real estate?*

A. (1) Fire (building and rents), (2) Accident, (3) Plate glass.

354—Q. *When should Trustees insure against accidents?*

A. In certain classes of property like tenement houses, where accidents are quite likely to happen, Trustees should protect their estate by taking out a policy of accident insurance.

355—Q. *When should plate glass insurance be effected?*

A. It is usually required on store or shop property.

356—Q. *Should a Trustee insure the rents of improved real estate in case of fire?*

A. In every case where the rental amounts to any substantial sum, a Trustee should insure these rents. This is quite as important as insuring the building, as the ordinary fire policy does not cover loss of rent.

357—Q. *Is it necessary for a Trustee to take out all the foregoing insurance?*

A. It depends upon circumstances. It is a matter of sound business judgment to be determined by character of property, productiveness, etc.

358—Q. *What are the essential duties of a Trustee in the care of unimproved real estate?*

A. He should see that taxes and assessments are paid, and that the property be not occupied by any person or persons without the Trustee's consent.

359—Q. *Is a Trustee allowed to charge for the services of an agent in collecting rents?*

A. Yes.

Perry, § 409.

360—Q. *Must Trustees act together in selling real estate?*

A. Yes; they must act jointly in this and in all other things.

Stout *v.* Rider, 12 Hun 574; Cooper *v.* Ill. Cent. R. R., 38 App. Div. 22, 28; L. 1896, c. 547, § 146.

361—Q. *Should the actual price for which Trustees sell real estate be expressed in the deed conveying it?*

A. It should. (See Executors, Q. 160.)

Binzen *v.* Epstein, 58 App. Div. 304.

362—Q. *If Trustees are empowered to sell real estate, can they ever be divested of that power?*

A. Yes. If the Trustees fail to exercise their power of sale for a considerable period, the heirs may unite and sell the property without regard to the power of sale conferred upon the Trustees.

Greenland *v.* Waddell, 116 N. Y. 234; Hetzel *v.* Barber, 69 N. Y. 1.

363—Q. *What happens if a Trustee gives a lease for a longer term than his powers permit?*

A. The lease will be good to the extent of his power and no more.

Matter of Armory Board, 29 Misc. 174.

(d) Taxation.

(See Executors, Q. 173-190.)

364—Q. *Upon what is a Trustee taxable?*

A. Upon all property in his hands not specially exempt by law.

365—Q. *Where is the Tax properly levied?*

A. The Tax always follows the Trustee and is assessed at his place of residence.

L. 1896, c. 908, § 8; Peo. *ex rel.* Young *v.* Dederick, 40 App. Div. 570; affirmed 160 N. Y. 687.

366—Q. *Where there are two or more Trustees, who reside in different parts of this State, where is the property taxable?*

A. Each Executor or Trustee is taxed an equal portion of the value of the property held by them.

L. 1896, c. 908, § 8.

367—Q. *What are assessments?*

A. They are special taxes levied upon real estate usually to pay for the local improvements.

368—Q. *If a Trustee finds property in his charge over-taxed, what should he do?*

A. There is a certain time appointed by each taxing authority, during which it will receive corrections of taxation. If the applicant does not receive redress in this way he can appeal to the Courts. In New York City the taxes are levied on the second Monday in January, and the books remain open for correction and review until the first day of April; outside New York and other specified cities they are open between August 1st and the third Tuesday in August. (See Executors, Q. 179.)

L. 1890, c. 908; §§ 32, 35, 36 (1901), N. Y. City Charter, §§ 892, 895, 898.

(e) Accounting.

(See Executors, Questions 206-225.)

369—Q. *When may a Trustee file an Intermediate Account?*

A. At any time, and he may also annually render and finally judicially settle his accounts. (Q. 207.)

C. 2802.

370—Q. *When may he be compelled to file an Intermediate Account?*

A. At any time in the discretion of the Surrogate.

C. 2803.

371—Q. *Within what time may a Trustee voluntarily settle his Accounts and obtain his discharge?*

A. When one year has expired since the probate of the Will, or when the trusts, or any one of them, have been or are ready to be executed.

C. 2810.

372—Q. *When a Trustee dies, who settles his Accounts?*

A. His Executor.

C. 2606.

373—Q. *When may the judicial settlement of a Trustee's account be compelled?*

A. 1. Where one year has expired since the Will was admitted to probate.

2. Where the Trustee has been removed, or for any other reason, his powers have ceased.

3. Where the Trusts, or one or more distinct and separate Trusts, created by the terms of the Will, have been or are ready to be executed, so that the persons beneficially interested are, by the terms of the Will or by operation of law, entitled to receive money or other personal property from the Trustee. (Q. 208.)

C. 2807.

(f) Miscellaneous.

374—Q. *What is the compensation of a Trustee?*

A. The same as Executors. (See Question 228.)

C. 2730, 2802, 2850.

375—Q. *Is a Trustee who is also an Executor entitled to fees for commissions in both capacities?*

A. No. Unless his functions are entirely different as Executor and as Trustee (and usually they are not) he is entitled

to but one commission. If they are separable, however, he is entitled to double commission.

Hurlburt *v.* Durant, 88 N. Y. 121, 127; Matter of Hood, 98 N. Y. 363; Matter of Mason, 98 N. Y. 527; Matter of Reed, 45 App. Div. 196, 204; Matter of McAlpine, 126 N. Y. 285.

376—Q. *How should a Trustee collect his fees or commissions?*

A. If he accounts the decree will make provision for them. If he does not account each year he should deduct the amount each year from the income. If he fails to do this he may be deemed to have waived his commissions.

Spencer *v.* Spencer, 38 App. Div. 403; Matter of Haight, 51 App. Div. 310.

377—Q. *Is a Trustee liable for robbery by which funds are lost?*

A. No. Unless the robbery occurred from gross negligence, or, of course, unless the Trustee is in some way chargeable with participation in it.

McCabe *v.* Fowler, 84 N. Y. 314.

378—Q. *Should an Executor, Administrator or Trustee who mismanages an Estate be entitled to commissions?*

A. No. As a rule any misconduct on their part cancels their right to commissions.

This matter is, however, in the discretion of the Surrogate, or whatever Judge has jurisdiction.

Cook *v.* Lowry, 95 N. Y. 103, 114.

379—Q. *If a person is appointed successively Temporary Administrator and then Executor and Trustee, is he entitled to separate compensation in each capacity?*

A. No; except in cases of what is known as "excess compensation."

C. 2730.

380—Q. *If Trustees differ about the custody of funds or property, which one is to control?*

A. The Court will, on application of any of them, designate some place of deposit of the property, where it can be under their joint control or order.

C. 2602.

381—Q. *When may a Testamentary Trustee be compelled to give security?*

A. At any time on petition of any person interested showing facts which would make it necessary for an Executor to give security if he were applying for Letters Testamentary. (See Q. 41.)

C. 2815; Matter of Weil, 49 App. Div. 52.

382—Q. *Where one of two or more Testamentary Trustees dies, or is removed, or resigns, is a successor appointed?*

A. Unless the appointment is necessary in order to comply with the express terms of the will, or is otherwise beneficial, the remaining Trustees must proceed to execute the trust.

C. 2818.

383—Q. *Should a Trustee or an Executor ever depart from the express directions of the Will or Trust instrument?*

A. No. Even though action different from that prescribed by the Trust instrument would be more beneficial to the Estate and those interested in it, he should strictly adhere to the terms of his Trust. In certain cases it is proper to go to the Court for instructions, but no Executor or Trustee should, under any circumstances, attempt to "improve" on his instructions upon his own responsibility.

384—Q. *May a Trustee, or an Executor, or Administrator, disaffirm any wrongful act done by the decedent in fraud of creditors and others interested in his Estate?*

A. Yes, and it is his duty to do so; if he does not he may be held responsible.

L. 1858, c. 314, § 1, as amended by L. 1889, c. 487; 3 Birds. (2d ed.), 2645, § 232; Matter of Cornell, 110 N. Y. 351; Harvey *v.* McDonnell, 113 N. Y. 526.

385—Q. *What is the distinction between an Executor and a Trustee?*

A. An Executor is supposed to collect the assets and pay the debts and legacies; a Trustee to invest and manage a particular fund or Trust Estate under directions contained in the Will. Their duties are distinct, but often overlap.

Red. 269.

386—Q. *Whom does the expression "Testamentary Trustee" include?*

A. Every person except an Executor, an Administrator with the Will annexed, or a Guardian who is designated by a Will, or by any competent authority, to execute a Trust created by a Will; and it includes such an Executor or Administrator where he is acting in the execution of a Trust created by the Will, which is separable from his functions as Executor or Administrator.

C. 2514, subd. 6.

CHAPTER V.

LEGACIES AND LEGATEES.

387—Q. *Is a legatee always entitled to notice before probate of a Will?*

A. No, except when probate is objected to or opposed.

C. 2615, 2617.

388—Q. *What are the terms used to describe the various kinds of legacies?*

A. Specific, demonstrative, general. These are again divided into vested, contingent, conditional or absolute legacies.

A legacy is said to abate when there are not sufficient funds to pay all claims, and it is reduced proportionately. A legacy is said to lapse when the beneficiary is dead or incapable of taking the legacy.

2 R. S. 66, § 52; Matter of Wells, 113 N. Y. 396.

389—Q. *What is a specific legacy?*

A. A specific legacy is a bequest of a specified part of a testator's personal estate distinguished from all others of the same kind. For example, a bequest to an in-

dividual of the proceeds of a bond and mortgage, particularly describing it, is a specific legacy.

Crawford *v.* McCarthy, 159 N. Y. 514, 519.

390—Q. *What is a demonstrative legacy?*

A. A demonstrative legacy is a bequest of a certain sum of money, stock or the like, payable out of a particular fund or security. For example: A bequest of the sum of $1500 payable out of the proceeds of a specified bond and mortgage is a demonstrative legacy. A demonstrative legacy partakes of the nature of a general legacy by bequeathing a specified amount, and also of the nature of a specific legacy by pointing out the fund from which payment should be made; but it differs from the specific legacy in the particular that, if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the Estate.

Crawford *v.* McCarthy, 159 N. Y. 519.

391—. *What is a general legacy?*

A. A general legacy is a gift of personal property by a last Will and Testament, not amounting to a bequest of a particular thing or money, or of a particular fund designated from all others of

the same kind. For example: A bequest to an individual of the sum of $1500 is a general legacy.

Crawford *v.* McCarthy, 159 N. Y. 510, 519.

392—Q. *What is the peculiarity of specific legacies?*

A. They are not subject to abatement, and an Executor cannot apply them to the benefit of creditors until everything else has been disposed of, and they are the first legacies that must be paid by the Executor.

Toch *v.* Toch, 81 Hun, 410, 414; Larkin *v.* Salmon, 3 Dem. 270.

393—Q. *What happens when a specific legacy is not found by the Executor?*

A. It fails, and the legatee cannot get its equivalent.

Beck *v.* McGillis, 9 Barb, 35; Hopkins *v.* Gouraud, 30 Abb. N. C. 235.

394—Q. *Is this true of demonstrative legacies?*

A. It is not. If the fund or property out of which a demonstrative legacy fails, resort may be had to the general assets.

Crawford *v.* McCarthy, 159 N. Y. 514, 519.

395—Q. *Suppose there are funds to pay part, but not all, of the legacies, in what order should they be paid?*

A. In default of special instructions in the Will specific legacies must be paid first; then (probably) legacies left in lieu of dower, and then the general legacies equally as far as the funds allow.

Bliven *v.* Seymour, 88 N. Y. 469, 475; Matter of Barnes, 7 App. Div. 13; affirmed, 154 N. Y. 737.

396—Q. *Within what time must an Executor pay a legacy?*

A. Not until the expiration of one year from the time he takes office unless specially directed by the Will.

C. 2721.

397—Q. *If a legacy be directed to be paid before the expiration of one year, must the Executor pay it?*

A. Yes, but the Executor may require the legatee to furnish a bond with two sufficient sureties conditioned for the return of the legacy, or whatever part of it may be necessary, in case the assets of the Estate prove insufficient to pay the debts and all the legacies, or the probate of the Will be revoked or the Will itself declared void.

C. 2721.

398—Q. *May a legatee compel payment of a legacy before the expiration of one year,*

even though it is not specially directed by the Will?

Yes. In its discretion the court may direct payment of a legacy if the assets in the hands of the Executor justify it, and the payment of the legacy is necessary for the support or education of the legatee.

C. 2723.

399—Q. *Should a legatee always receive the exact amount of the legacy given him by the Will, provided there are sufficient funds in the hands of the Executor?*

A. No. Unless the Will expressly provides that the legacy be free from taxes the Executor must deduct the amount of taxes from the legacy.

400—Q. *Can a legatee compel an Executor to account?*

A. Yes, after the expiration of one year.

C. 2726, 2727.

401—Q. *Can a legatee sue an Executor for the amount of a legacy?*

A. Yes. If after the expiration of one year after the granting of Letters Testamentary the Executor or Administrator upon demand refuses payment.

C. 1819.

402—Q. *Is an accounting an expensive proceeding for an Estate?*

A. If there is a contest of any importance it is an expensive proceeding. If there is no contest the making and filing of the account itself is not at all a heavy charge.

403—Q. *What can a person interested in an Estate do to find out what has been done in the line of its administration?*

A. If the Executor has accounted, all persons directly interested in the Estate should be given notice. If a person is interested in the Estate, but not entitled to notice, and the Executor has accounted, his account will be on file in the court, where it is open to public inspection.

404—Q. *Can copies of an account be taken away?*

A. Yes.

405—Q. *How can objections to an account be filed?*

A. By putting on record in the court at the proper time a statement specifying the items of the account to which exception is taken.

406—Q. *Should a legatee always be represented by a lawyer?*

A. It is not necessary, unless there be litigation or unnecessary delay in settlement of the Estate.

407—Q. *To whom should payment of a legacy to an infant be made?*

A. Usually to his general guardian, or when it does not exceed $50 the decree may order it to be paid to the father or mother. (See Guardians, Q. 417-443.)

C. 2746.

408—Q. *Where a legacy is left to an unknown person what must the Executor or Administrator do?*

A. He must pay it into the State Treasury.

C. 2747.

409—Q. *Can a legatee be a witness to a Will?*

A. Yes, but if the Will cannot be proved without his testimony he must lose the legacy.

3 Birdseye's Rev. St., 2d ed., 3512, § 18.

410—Q. *Can a Legacy be renounced?*

A. Yes.

411—Q. *Does a person lose the benefit of a legacy by contesting the Will if the Testator so directs?*

A. The tendency of the authorities in this

State seems to be that he does, except in case of infancy.

Bryant *v.* Thompson, 59 Hun 545; 128 N. Y. 426; 1 Con. 412, 430; 44 Hun, 95; 3 Dem. 278; 10 Misc. 491.

412—Q. *If a legacy is left by a debtor to a creditor, does it act as a satisfaction of the debt?*

A. Not as a general rule.

Reynolds *v.* Robinson, 82 N. Y. 103; Cauldfield *v.* Sullivan, 85 N. Y. 153; Boughton *v.* Flint, 74 N. Y. 476; Red. 615.

413—Q. *Is a bequest by a creditor to his debtor a discharge of the debt?*

A. Yes.

Sholl *v.* Sholl, 5 Barb. 312.

414—Q. *Is a legacy to an Executor in lieu of his commissions binding upon the Executor?*

A. Yes. Unless he renounces the legacy, and he is not required to do this until he has ascertained which will be more advantageous, the commissions or the legacy.

C. 2730.

415—Q. *What is meant by "charging a legacy upon real estate?"*

A. If a Testator uses this expression in connection with a gift it imposes a lien

or charge upon his real estate which cannot be sold without satisfying the lien by payment or otherwise extinguishing it. Such a legacy lapses on the death of the legatee before payment, unless the Will provides otherwise or unless the delay in its payment has been for the convenience of the Estate.

Loder *v.* Hatfield, 71 N. Y. 92.

416—Q. *Does a legacy bear interest?*

A. Not until the expiration of one year from the granting of Letters Testamentary or Letters of Administration, unless the Will directs them to be sooner paid. After that period they bear interest at the legal rate per cent. There are, however, numerous exceptions to this rule depending upon the nature of the legacy and the wording of the Will.

2 R. S. 90, § 43; Matter of McGowan, 124 N. Y. 526; Thorn *v.* Garner, 113 N. Y. 198.

CHAPTER VI.

GUARDIANS.

417—Q. *What is a Guardian ad litem?*

A. The Guardian appointed by the Court to represent an infant in a legal proceeding. He is often called a Special Guardian.

418—Q. *Who is an infant?*

A. Any person under twenty-one years of age.

419—Q. *Has a Guardian ad litem any authority over the person or property of an Infant?*

A. No. He may only represent the infant's interests in Court, in the particular action or matter in which he is appointed.

420—Q. *Must infants always be represented by a Special Guardian in probate proceedings, or other matters in reference to Estates?*

A. Yes.

421—Q. *What is a General Guardian?*

A. The person charged with the care of the person or property, or both the person and property, of an infant.

422—Q. *How is a General Guardian appointed?*

A. Either by Will or deed, or by the Court on the nomination of proper parties.

423—Q. *Who may appoint a General Guardian?*

A. A married woman is the joint Guardian of her children with her husband, with equal powers, rights and duties in regard to them. Upon the death of either the father or the mother the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years and unmarried, may by deed or last Will, duly executed, dispose of the custody and tuition of such child during its minority, or for any less time to any person or persons. Either father or mother may in the lifetime of them both, by last Will, duly executed, appoint the other the Guardian of the person and property of such child during its minority. A person so appointed Guardian shall not exercise the power or authority thereof unless such Will is admitted to probate or the deed executed and recorded as provided by law.

The lawful marriage of a woman before she attains her majority terminates the General Guardianship in respect to

her person, but not with respect to her property.

L. 1896, c. 272, §§ 51, 54, as amended by L. 1899, c. 159.
C. 2851.

424—Q. *Who should petition the Court for the appointment of a General Guardian?*

A. The parents or near relatives, if the infant is under fourteen years of age. The infant, when over fourteen years.

C. 2822, 2827.

425—Q. *When a Guardian is appointed for an Infant under fourteen years, how long does the appointment last?*

A. The infant may terminate it when he or she becomes fourteen by applying for another Guardian to act during the remaining period of minority.

C. 2828.

426—Q. *Who is usually appointed Guardian?*

A. Either the father or mother, if living. If either or both be living, and the petition does not request their appointment, good cause for appointment of some other person must be shown.

C. 2823.

427—Q. *Is the same person usually appointed Guardian of the person and property?*

A. Yes. Except that no Guardian of the person of a married woman is ever appointed.

C. 2825.

428—Q. *Must a General Guardian give bonds?*

A. Yes.

C. 2830, 2831.

429—Q. *For what causes may a Guardian appointed by Court be removed?*

A. 1. Where the Guardian is disqualified by law, or is, for any reason, incompetent to fulfil his trust.

2. Where, by reason of his having wasted or improperly applied the money or other property in his charge or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the real or personal property of the ward, or by reason of other misconduct in the execution of his office, or his dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his office.

3. Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the Surrogate, contained in a decree or an order; or any provision of law, relating to the discharge of his duty.

4. Where the grant of letters to him was obtained by a false suggestion of a material fact.

5. Where he has removed, or is about to remove, from the State.

6. In the case of the Guardian of the person, where the infant's welfare will be promoted by the appointment of another Guardian.

C. 2832.

430—Q. *Does a person nominated as Guardian in a Will need any further authority from the Court before entering upon the duties of Guardian?*

A. Yes. No person may assume any power or authority over the person or property of an infant until the court has duly issued to him or her Letters of Guardianship.

C. 2851.

431—Q. *When a person is nominated as Guardian by Will, within what time must he or she qualify?*

A. Within thirty days after probate of the Will. This time may be extended in the discretion of the court to three months, but not longer.

C. 2852.

432—Q. *May a person nominated as Guardian renounce the appointment?*

A. Yes.

C. 2852.

433—Q. *Must a Guardian appointed by Will give a bond?*

A. Yes, if he or she would have been compelled to give a bond had he or she been nominated as Executor. (See Question 41.)

C. 2853.

434—Q. *What are some of the most important duties of a General Guardian?*

A. (1) He should make an inventory of the property in his hands.

(2) He should invest any funds in his hands.

(3) He should keep a full and accurate account of all receipts and disbursements.

(4) He should take the instruction of the Court as to payment of income or principal for support, education or maintenance of the ward.

C. 2842, 2844, 2845.

435—Q. *When must a General Guardian account?*

A. In January of each and every year.

C. 2842.

436—Q. *By whom may a General Guardian be compelled to file an account?*

A. 1. By the ward, after he has attained his majority.

2. By the Executor or Administrator of a ward, who has died.

3. By the Guardian's successor, including a Guardian appointed after the reversal of a decree, appointing the person so required to account.

4. By the surety in the official bond of a Guardian whose letters have been revoked, or by the legal representative of such surety. Citation under this subdivision must be directed to both the Guardian and the ward.

C. 2847.

437—Q. *For what causes may a Guardian appointed by Will be removed?*

A. For any cause that would be sufficient to remove a Testamentary Trustee (Q. 285).

C. 2858.

438—Q. *May a Guardian appointed by Will or deed resign?*

A. Yes.

C. 2859.

439—Q. *When a sole General Guardian resigns or is removed who appoints the successor?*

A. The Court which removed or allowed him to resign.

C. 2605, 2860.

440—Q. *In what should a General Guardion invest?*

A. In such securities as are allowed to Executors, Administrators and Trustees. (See Q. 113-128, 286-350.)

441—Q. *Should a Guardian take any action of importance in reference to an infant's estate without express directions from the court?*

A. No.

442—Q. *Are the liabilities of a Guardian similar to those of Executors and Trustees?*

A. Very largely. He may be sued by the ward for waste when the latter attains majority.

C. 1653.

For commissions, bonds, investments, removal, resignation, etc., the provisions under Executor and Trustees will be found generally applicable to guardians.

CHAPTER VII.

WILLS.

443—Q. *Who can make a Will?*

A. Males of eighteen years of age and upwards and of sound mind; females of sixteen years and upwards and of sound mind may make Wills of personal estate; all persons of sound mind and over the age of twenty-one years may make Wills of real estate.

L. 1867, c. 782, §§ 3, 4; 3 Birdseye, R. S. 2d ed., 3509, § 1; 3510, § 6.

444—Q. *What is a nuncupative Will?*

A. An unwritten or oral Will disposing of personal property.

3 Birdseye, R. S., 2d ed., 3510, § 7.

445—Q. *Who may dispose of personal property by oral Will?*

A. No one except a soldier in actual military service or mariner at sea.

3 Birdseye, R. S., 2d ed., 3510, § 7; 2 R. S. 60, § 22.

446—Q. *Must all other Wills be in writing?*

A. Yes.

447—Q. *What is a holograph Will?*

A. One written entirely in the handwriting of the Testator.

448—Q. *Must a Will be in the handwriting of the Testator?*

A. No. Any one may write it. Important Wills are usually written on prepared paper with special ink by an engrosser or professional penman.

449—Q. *May a Will be typewritten?*

A. Yes.

450—Q. *Should printed forms ever be used?*

A. It is most undesirable. Many Wills drawn on blank forms have been rejected by the courts.

Matter of Andrews, 162 N. Y. 1; Matter of Whitney, 153 N. Y. 259; Matter of Conway, 124 N. Y. 455.

451—Q. *What is the formal signing, sealing and declaring of a Will called?*

A. Executing it.

452—Q. *Must a Will be drawn in any particular form?*

A. No. Provided it is executed according to law, the phraseology is unimportant as far as probate is concerned.

453—Q. *Should a lawyer always be employed to draw a Will?*

A. It is not absolutely necessary, but an amateur Will is usually an expensive economy for the estate.

(a) Witnesses.

454—Q. *How many witnesses should there be to a Will?*

A. In New York two. Some States require three.

2 R. S., 63, § 40; 3 Birdseye, R. S., 2d ed., 3510, § 8.

455—Q. *Who should be selected as witnesses?*

A. Persons of intelligence who can read and write and who are over the age of twenty-one years and are not relatives or legatees?

456—Q. *Why should a legatee or a relative not act as a witness?*

A. Because it is wiser, if possible, to have wholly disinterested witnesses. Moreover if the person be a legatee or a beneficiary under a Will and the Will cannot be proved without the testimony of such legatee witness, he will lose a part and perhaps the whole of his legacy.

C. 829, 2544; 2 R. S., 65, §§ 50, 51; 3 Birdseye, 2d ed., 3512, § 18.

457—Q. *Should an Executor act as a witness?*

A. It is not improper provided he be not a legatee or a relative.

C. 2544; Children's Aid Society *v.* Loveridge, 70 N. Y. 387; Rugg *v.* Rugg, 21 Hun, 383 affirmed, 83 N. Y. 592.

458—Q. *Should a lawyer be a witness?*

A. It is quite proper and usual for the counsel who drew the Will to be one of the witnesses provided he be not a legatee or relative.

C. 836.

459—Q. *Should a physician be a witness?*

A. It is perfectly proper provided he be not a relative or a legatee.

C. 836.

460—Q. *Can witnesses be compelled to testify?*

A. Yes.

2 R. S., 65, § 50; 3 Birdseye, 2d ed., 3512, § 18.

461—Q. *If witnesses are absent, how can their testimony be procured?*

A. A commission will be ordered to take their testimony in writing if this be necessary.

C. 2620.

462—Q. *Must all the witnesses to a Will testify as to its execution?*

A. Two witnesses must testify unless their failure to do so is satisfactorily explained.

C. 2618, 2619, 2620; Graber *v.* Haaz, 2 Dem. 216; Lockwood *v.* Lockwood, 51 Hun, 337.

463—Q. *Suppose that witnesses are dead, or have forgotten the occurrence at the time the Will is offered for probate, how is the Will established?*

A. By proof of the handwriting of the Testator and of the subscribing witnesses and also such other circumstances as shall be sufficient to prove the Will upon the trial of an action.

C. 2620.

464—Q. *Suppose that the witnesses who signed the Will testify against the execution of the Will, will such testimony prevent the Will from being proved?*

A. No. In such a case on proper proof of the handwriting of the Testator and that of the subscribing witnesses and other corroborative evidence, the Will may still be admitted to probate.

C. 2620; Matter of Hesdra, 119 N. Y. 615; Matter of Cottrell, 95 N. Y. 329.

465—Q. *Must witnesses to a Will always append their addresses?*

A. Yes. There is a penalty of $50 fine if they fail to do so.

2 R. S., 64, § 41; 3 Birdseye, 2d ed., 3511; § 9.

(b) Signing, sealing and declaring.

466—Q. *What is an Attestation Clause?*

A. It is the certificate signed by the witnesses reciting the formalities that were performed at the execution of the Will.

467—Q. *Give the correct form of an Attestation Clause.*

A. The foregoing instrument consisting of —— pages of paper was now, here, at the date thereof, signed, sealed, published and declared by the above named Testator as and for his last Will and Testament, in the presence of us, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as Witnesses.

2 R. S. 63, § 40; 3 Birdseye, 2d ed., 3510, § 8.

468—Q. *What are the various things that should be done in order to insure the proper execution of a Will?*

A. 1. The Testator should be, if possible, alone in the room with the Witnesses,

who should be two persons of intelligence and not beneficially interested in the Will.

2. He should declare the paper to be his last Will and Testament at the time of subscribing his name.

3. He should request each of the Witnesses to act as such.

4. He should sign his name at the end of the Will and just above the Attestation Clause.

5. The Witnesses should watch him sign and each Witness in turn should sign his name and append his address, and the other Witness and the Testator should watch the signature.

In other words, every statement contained in the Attestation Clause should be made true. (Q. 467.)

2 R. S., 63, § 40; 3 Birdseye, 2d ed., 3510, § 8; 3511, § 9.

469—Q. *Is it necessary that the Will be sealed by the Testator?*

A. No, but it is usual to attach a seal of some kind, usually a small wafer.

470—Q. *Is it necessary that the Testator should actually declare the instrument to be his last Will and Testament, and in so many words request each of the witnesses to act as such?*

A. It is absolutely necessary. The Will cannot be duly executed unless each of the things mentioned in the Attestation Clause is done. Many Wills have been rejected because of the neglect of some of these simple formalities.

Wesley v. Wesley, 32 N. Y. 371.

471 *Q. Is the Attestation Clause conclusive proof of the facts stated therein?*

A. No. But in the absence of contradiction it is proof that the formalities required by law were complied with. It is prima facie proof.

Matter of Peyser, 93 N. Y. 233; Matter of Hedden, 109 N. Y. 615.

472 *Q. Is it necessary that the Will have the Attestation Clause?*

A. *No.* But it is necessary that the Will be executed exactly as the Attestation Clause provides.

473 *Q. Where should a Will be signed?*

A. The law provides that it must be subscribed at the end, that is to say, below the last line.

2 R. S., 63, § 40; 3 Birdseye, 2d ed., 3510, § 8.

474 *Q. What other formalities should be complied with in executing a Will?*

A. It is quite proper for the Testator to sign each page of the Will on the margin at the foot of each page, numbering each signature, thus: John Smith (1); John Smith (2).

475—Q. *What is the object of this precaution?*

A. To identify the pages in case any become separated, misplaced or lost.

476—Q. *May a Testator request another to sign a Will for him?*

A. Yes, but this should not be done unless it is absolutely necessary, and then due precaution should be taken to provide for proof of the necessary authority.

2 R. S., 64, § 41; 3 Birdseye, 2d ed., 3511, § 9.

477—Q. *Where should a Will be deposited after it is executed?*

A. In a safe deposit company, or with the counsel who drew it, or in any other safe keeping. It may be deposited in the County Clerk's office, the Surrogate's office, or, in New York County, in the Register's office.

2 R. S., 404; § 67; 1 Birdseye, 2d ed., 1114, § 103.

478—Q. *Is it proper to keep a copy of a Will?*

A. It is quite usual and proper for the counsel and the Testator each to keep a copy.

479—Q. *May a Will once made and executed be altered by erasures or interlineations?*

A. No. After it has been duly executed such changes would invalidate the whole document. Alterations must be made by drawing a new Will or by adding a Codicil.

(c) Codicils.

480—Q. *What is a Codicil?*

A. It is an amendment or postscript to a Will which may revoke or modify any of the original provisions of the Will.

481—Q. *How should a Codicil be executed?*

A. With exactly the same formalities as the original will, with the addition that the Testator should reaffirm the Will to which he is appending the Codicil and the Attestation Clause should contain a statement to that effect.

Brown *v.* Clark, 77 N. Y. 369; Caulfield *v.* Sullivan, 85 N. Y. 153.

482—Q. *Is it wise to add many Codicils to a Will?*

A. No. Unless great care be shown they are apt to contain contradictory provisions and lead to confusion. In most cases it is quite as difficult to draw an important Codicil as it is to draw a new Will.

(d) Revocation.

483—Q. *How may a Will be revoked?*

A. 1. By intentional destruction by the Testator.

2. By intentional destruction by some person at the special instance and request of the Testator, which must be proved by at least two witnesses.

3. By the execution of a new Will or other writing declaring such revocation and executed with the same formalities with which the Will itself was required by law to be executed.

4. By marriage or the birth of children in certain cases.

5. By such a conveyance of the Testator's property as is wholly inconsistent with the previous devise or bequest.

2 R. S., 64, §§ 42, 43, 44; 3 Birdseye, 2d ed., 3511, § 10-24.

484—Q. *Does the cancellation of a Will revive one formerly made?*

A. Not unless the Testator make it plain that this was his intention or expressly republished the Will first made.

R. S., 66, § 53; 3 Birdseye, 2d ed., 3513, § 21.

485—Q. *Does marriage and birth of children revoke a Will?*

A. If after making a Will a man shall marry and have children and the wife or children shall be living at his death, the Will is revoked unless provision shall be made for the children, or unless there is some intention shown in the Will not to make such provision.

If the Testator shall have a child born after the making of a will and the child be not provided for, then such child shall take the share to which it would have been entitled had its parent died without making a will.

2 R. S. 64, § 43, 65, § 49, as amended by L. 1869, c. 22; 3 Birdseye, 2d ed., 3511; § 11, 3512, § 17.

486—Q. *Does the marriage of a woman revoke her Will formerly made?*

A. Yes.

2 R. S., c. 64, § 44; 3 Birdseye, 2d ed., 3511, § 12.

487—Q. *May a lost or destroyed Will ever be admitted to probate?*

A. Yes, where it has been executed in such manner and under such circumstances that it might be proved in the Surrogate's Court and the original is in another State or country and cannot be procured, or if it has been lost or destroyed by accident or design, and it was in existence at the time of Testator's death, or was fraud-

ulently destroyed in his life time and contents are proved by two witnesses or a copy and one witness.

C. 1861-1867.

(e) Miscellaneous.

488—Q. *If a person dies intestate or does not dispose of his property by Will, what becomes of it?*

A. It will be distributed according to law. As to personal property, see Administrators (Q. 263.) The real estate will descend as follows:

1. To his lineal descendants.
2. To his father.
3. To his mother; and
4. To his collateral relatives, as prescribed in the following sections:

SEC. 282. Lineal descendants of equal degree.—If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.

SEC. 283. Lineal descendants of unequal degree.—If any of the descendants of such intestate be living and any be

dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received.

SEC. 284. When father inherits.—If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

SEC. 285. When mother inherits.—If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a

brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

SEC. 286. When collateral relatives inherit; collateral relatives of equal degrees.—If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.

SEC. 287. Brothers and sisters and their descendants.—If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister

shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

SEC. 288. Brothers and sisters of father and mother and their descendants. —If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of his father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living:

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers

and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father of their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

SEC. 289. Illegitimate children.—If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legiti-

mate. In any other case illegitimate children or relatives shall not inherit.

SEC. 290. Relatives of the half-blood. —Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

SEC. 291. Cases not hereinbefore provided for.—In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

SEC. 292. Posthumous children and relatives.—A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

SEC. 293. Inheritance, sole or in common.—When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons they shall take as tenants

in common, in proportion to their respective rights.

SEC. 294. Alienism of ancestor.—A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.

SEC. 295. Advancements.—If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much, only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if

any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life, is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, is an advancement.

SEC. 296. How advancements adjusted.—When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.

L. 1896, c. 547, §§ 281-296.

489—Q. *What are the advantages of making a Will, if one is satisfied with the disposition of property made by law?*

A. In case of real estate the main advantage is to avoid what is known as a partition sale—a very expensive proceeding

which any properly drawn Will may avoid. In the matter of both real and personal property the Testator can provide for the special needs of his particular property, which might be sacrificed by the application of general laws.

490—Q. *What is a power of sale?*

A. It is the authority given to the Executors to sell property of the Testator.

491—Q. *Is it wise to supply Executors with such authority?*

A. Yes, it is, as a rule, the most important provision in the Will, as it facilitates the settlement of the estate and in the case of real estate prevents the necessity for partition, a costly legal proceeding. Persons who cannot be trusted with a discretionary power of sale should not be appointed Executors.

492—Q. *Is any particular form of words necessary to endow Executors or Trustees with power of sale?*

A. No. It is only necessary that the authority be certain, absolute and full.

493—Q. *Give a desirable form of full power of sale to Executors or Trustees.*

A. I authorize and empower my Executors

(and Trustees) herein named in their discretion to sell and dispose of any and all of my property, real and personal, wherever situate and however held, at either public or private sale, and at such time or times and upon such terms as may seem to them fitting and proper, and to give to the purchaser or purchasers of any of my said property all deeds, bills of sale or other muniments of title that may be requisite or necessary.

494—Q. *Give a desirable form for giving full power for making investments.*

A. I authorize and empower my Executors (and Trustees) herein named to invest and re-invest all funds in their charge applicable for investment in such first-class interest bearing securities as they, in their discretion, shall deem fitting and proper without regard as to whether such securities are or are not securities to which Executors are limited by law in making investments, and to change such investments from time to time as they may deem best, and to collect and receive the rents, income and profits thereof.

495—Q. *Should permission to use a person's name as Executor be asked?*

A. It is not necessary. It is a matter for the Testator's personal judgment.

496—Q. *Should there be any reference in the Will to the payment of taxes?*

A. Yes. If the Testator desires that his beneficiaries be not taxed he should so provide in the Will. Otherwise they will receive the legacies less the tax, if any.

497—Q. *When should a new Will be made?*

A. In general when any new state of facts arises not expressly governed by the terms of the Will, and which cannot be provided for in a short, simple codicil. It should not provide for remote contingencies, but should deal with the reasonably immediate future.

498—Q. *For what period may property be tied up or alienated by Will?*

A. The laws of New York provide that the absolute power of alienation of real property and the absolute ownership of personal property shall not be suspended for more than two lives in being at the death of the Testator, except that income may be accumulated for the benefit of infants during the period of their minority. This is an

extremely technical and difficult subject which no layman should think of undertaking without the aid of counsel.

L. 1896, c. 547, §§ 32, 51; L. 1897, c. 417, §§ 2, 4.

499—Q. *In leaving legacies to charitable institutions, what are the important things to be be considered?*

A. It is important that the exact corporate name be used and that the society or the institution have the power to receive and use the gift for the purpose, if any, prescribed.

It should also be remembered that when the Testator dies leaving a wife, husband, parent or child he may not bequeath more than fifty per cent. of his property to charity, in Trust or otherwise, and that such bequest made within two months of the Testator's death is invalid.

L. 1860, c. 360, § 1; 3 Birdseye, 2d ed., 3513, § 25; L. 1848, c. 319, § 6; 1 Birdseye, 2d ed., 260, § 1.

500—Q. *What corporations may act as Executors, Administrators, Trustees, or Guardians?*

A. Trust Companies generally are authorized to act in those capacities. But any corporation, whose charter gives it the requisite power, may undertake such duties if competent as an individual. (See Q. 27.)

501—Q. *Is it desirable to appoint corporations to such offices?*

A. That depends upon the circumstances of each case. It may, however, be said in general, that there are many advantages in appointing corporations and it is becoming quite usual to do so,—especially with large estates.

502—Q. *What are some of the advantages of such appointment?*

A. Corporations do not die or remove, and their financial responsibility is generally more stable. They are disinterested and not liable to the temptations, jealousies, or personal feelings of individuals. They are "professional" executors, etc., and have the knowledge and experience of experts or specialists.

GENERAL INDEX.

[*The numbers refer to Questions.*]